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Mississippi Law Journal

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Mechanics' Liens: An Interpretation of Section 356 as Amended†

*James M. Brown**

I. Introduction

Very few lawyers in the United States have become involved in mechanics' lien actions without experiencing frustration over the demands of the statutes, doubt over their proper application, and uncertainty over the results they will produce. This experience is perhaps the only element of uniformity to be found when one begins to compare the lien laws of the various states.[1] There are so many disparities from state to state in so many of the basic provisions of the lien laws that it is difficult to believe they all stemmed from one original purpose and model.[2] In many states they have been tampered with from session to session of the legislature until the struggle among the lobbyists has degenerated to a level of protecting the status quo, however unsatisfactory that situation may be to them.[3]

Uncertainty over lien laws is not limited to lawyers. Mr. Carl Stephens, while President of the Mississippi Lumber Dealers' Association,

†An article by the author concerning mechanics' lien notice requirements will appear in May 1966.

* Associate Professor of Law, George Washington University.

[1]See, *e.g.*, Committee on Judiciary and Law Reform, Florida Legislative Council, Significant Features of Mechanics' Lien Laws of the Fifty States (1962) (based on National Ass'n of Credit Management, Credit Manual of Commercial Laws [1961]).

[2]See Moore-Mansfield Const. Co. v. Indianapolis, N.C. & T. Ry., 179 Ind. 356, 101 N.E. 296 (1913). "The origin of such laws [liens of mechanics and materialmen] in America arose from the desire to establish and improve, as readily as possible, the city of Washington. In 1791, at a meeting of the commissioners appointed for such purpose, both Thomas Jefferson and James Madison were present, and a memorial was adopted urging the General Assembly of Maryland to pass an act securing to *master builders* a lien on houses erected and land occupied. The requested law was enacted December 19, 1791. . . ." *Id.* 101 N.E. at 301.

[3]See, *e.g.*, Letter from John D. McCarthy, Executive Vice-President, Illinois Lumber and Material Dealers' Ass'n to author, Sept. 18, 1962, advising with regard to the Illinois acts relating to liens for building mechanics: ". . . [W]e have had attacks on our position in every session of the legislature that we have been able to prevent and keep the law as it is. . . ." [*sic*]

wrote to the National Association to express his frustration over mechanics' lien difficulties, which he described as:[4]

> . . . a problem of very great concern to our . . . membership. . . . [W]e are quite often dealing with virtually insolvent [contractor] customers, and we often lose the value of our materials when they bid a job too low and fail to come out with enough money to pay their labor and to settle for their materials. The way our Mississippi law apparently reads,[5] we materialmen must give the owner of the property a written notice advising him of the indebtedness before the contract has been settled for; and failure to do this prevents our going to the homeowner for payment of the materials. We have all lost money in selling contractors who have gone broke on the job we have furnished materials on, who have drawn all their contracts provided for, then simply told us they could not pay us. . . .[6]

Mr. Stephens' comments accent the classic dilemma confronting the drafters of mechanics' lien (and other) statutes, of deciding among two or more potential victims which one(s) must bear the loss occasioned by a deprivor who for some reason cannot be made to pay the costs of the deprivation.[7] Some state lien laws impose upon the owner whose property has been improved the burden of responsibility for payment not only to the prime contractor, but also to those subcontractors and materialmen whose labor and materials were provided through the prime contractor. Failure of the prime contractor to pay the participating subcontractors and materialmen subjects the property improved to their direct lien rights, and to an ultimate foreclosure sale.[8] Since this method

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[4]Letter from Carl H. Stephens, Union Lumber Co., New Albany, Mississippi, to Edward H. Libbey, Secretary, National Retail Lumber Dealers' Ass'n, Washington, D.C., Jan. 31, 1963, on file in National Retail Lumber Dealers' Ass'n office, Washington, D.C.

[5]*Cf.*, MISS. CODE ANN. § 372 (1956). Note that the comment by Mr. Stephens indicates some degree of misunderstanding even though he is exceptionally well-versed in Mississippi lien laws. Most of those who consider the security afforded them by the lien laws when extending credit have a much more distorted concept of their rights and privileges. One prime consideration in any legislative modification should be whether or not those who must rely on and act under the statute will be able adequately to understand it.

[6]Under MISS. CODE ANN § 372 (1956) the owner can never be liable for more than the original amount of the contract. Therefore every too low bid by the prime contractor jeopardizes particularly those sub-contractors and materialmen who participate in the later stages of the project.

[7]See generally PROSSER, TORTS 14-16, 22-23 (3d ed. 1964); Comment, 68 YALE L.J. 138, 141-51 (1958).

[8]*E.g.*, PA. STAT. ANN. tit. 49, § 1301 (1963); Bryan v. Stempkowski, 88 Pa. Super. 390 (1926) (all debts due a sub-contractor may be made a lien against the real estate). This type statute, of which there are many variations, is commonly referred to as the Pennsylvania rule. See Comment, 68 YALE L.J. 138, 144 (1958).

may force the owner to choose between paying twice or losing the property after having paid once for the improvements, such a procedure is never palatable to him. His lack of understanding of his obligations under such laws and the fact that it is often nearly impossible for him to protect himself by policing these secondary payments make him vulnerable and cause him to be a bitter spokesman against both the building industry and the law that works such apparent inequities on him.

Other states have taken a different approach. They limit the owner's total responsibility to the amount of the original contract.[9] Some states go even farther and limit materialmen and subcontractors who are not in privity with the owner to procedures directed only at undisbursed funds under the original contract. In addition they require, as a prerequisite to a direct claim against such funds still in the owner's hands, that the owner be given a "stop-notice" informing him of the fact that the claimants have not been paid.[10] Mississippi has for more than 100 years been in this category.[11]

The purpose of this article is to consider whether recent changes in Mississippi's lien laws have put her, perhaps accidentally, into one of the other categories. The question stems from the revision, in 1962, of section 356 of the Mississippi Code.[12] The general assumption that this 1962 act merely extended existing coverage to engineers, etc., as the 1928 act had extended it to architects,[13] could turn out to be at considerable variance with what the courts hold to have been in fact achieved by the 1962 change. A reasonable expectation is justified that the courts will interpret the 1962 amendments to give direct lien rights against improved property to those subcontractors and materialmen who participated in the improvement, even though they are not in privity with the owner. Such a result could be reached solely on the basis of sound rules of statutory interpretation. The concomitant growth

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Among the states basically following the Pennsylvania rule are: Arkansas, ARK. STAT. ANN. § 51-601 (1947); Georgia, GA. CODE ANN. § 67-2001 (1957); and Kentucky, KY. REV. STAT. ANN. § 376.010 (1962).

[9]*E.g.*, N.Y. LIEN LAW §§ 3, 4 (1958). This is the other type of statute and is described as the New York rule. See Comment, 68 YALE L.J. 138, 142 (1958). Other states basically following this rule include: Alabama, ALA. CODE ANN. tit. 33, § 37 (1958); Illinois, ILL. REV. STAT. ch. 82, § 21 (1963); and Louisiana, LA. CIVIL CODE ANN. art. 2772 (1951).

[10]*E.g.*, MISS. CODE ANN. § 372 (1956).

[11]Miss. Laws 1928, ch. 137; Miss Laws 1918, ch. 128; Miss. Laws 1904, ch. 153; Code of 1930, § 2274; Code of 1892, § 2714; Code of 1880, § 1381; Revised Code of 1857, ch. 39, art. 4.

[12]Miss. Laws 1962, ch. 488, §§ 1, 2.

[13]*Compare* Miss. Laws 1928, ch. 137, *with* Miss. Laws 1962, ch. 488. See, *e.g.*, Yates, *Construction and Mechanics Liens in Mississippi* 2-12 (1965) (unpublished thesis in University of Mississippi Law School Library).

of the state as more and more industrialization takes place may well incline the court in that direction for policy reasons as well.

II. History

In order to understand the full significance of what the legislature accomplished when it modified section 356 in 1962, it is necessary to examine briefly some historical background to Mississippi's lien statutes. It is also necessary to observe certain patterns of carelessness in drafting amendatory legislation which, though recurrent through the years, had fortunately been either of little significance or so obviously contrary to legislative intent as to be ignored, prior to 1962.

The mechanics' lien is a "right to have a debt satisfied out of a particular thing, in preference to all other adverse interests subsequently acquired."[14] The right was created by statute[15] to protect craftsmen from those who would enjoy the fruits of the labor contributed and then refuse to pay for the improvements acquired.[16] In general, the early mechanics' lien statutes permitted the tradesman to force the sale of property he had improved in order to satisfy an outstanding and defaulted debt owed to him for his labor. Building craftsmen were initially given this privilege as an enticement to enter areas where they were in short supply, and thus they enjoyed a status commanding a special consideration.[17] Within two years after Mississippi became a state, certain building tradesmen were able to acquire a statutory priority as creditors through "An Act, for the relief of certain mechanics."[18] This act, limited initially to Natchez, but soon broadened to include first Monticello and then the entire state,[19] made "every dwelling house, store . . . or other building" subject to the obligation of payment for labor or materials provided by the crafts specified[20] "before any other lien, which originated subsequent to the commencement thereof. . . ." The basic concept was a pure two-party relationship, with a

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[14]Richardson v. Warwick, 8 Miss. (7 How.) 131, 134 (1843).

[15]Pincus v. Collins, 198 Miss. 283, 287, 22 So. 2d 361, 362 (1945) (dictum); *cf.*, Chancellor v. Melvin, 211 Miss. 590, 597, 52 So. 2d 360, 364 (1951).

[16]Anderson v. Seamans, 49 Ark. 475, 479, 5 S.W. 799, 800 (1887); Colp v. First Baptist Church of Murphysboro, 341 Ill. 73, 173 N.E. 67, 68 (1930).

[17]Stalling, *The Need for Special, Simplified Mechanics' Lien Acts Applicable to Home Construction*, 5 Law & Contemp. Prob. 592 (1938). See also Rochel, Mechanics' Liens 1 (1909).

[18]Poindexter's Code of 1823, ch. 110, at 472, 473.

[19]Hutchinson's Mississippi Code, 1798 to 1848, ch. 45, art. 4, §§ 1-3, at 626.

[20]The crafts specified were: brick-maker, brick-layer, mason, lime-merchant, carpenter, joiner, painter, gilder, ironmonger, blacksmith, plasterer, and lumber merchant, or any other persons employed in furnishing materials for, or in the construction of such dwelling-house, store, shop or other building.

forced sale to equalize a situation which would otherwise result in an unjust enrichment of one party at the expense of the other.

In 1830 the craftsman "lobby" secured a supplement to the act of 1821 extending to the favored group of mechanics "a lien, . . . which . . . shall have preference to all manner of judgments, executions, and other claims, bearing date *previous to,* as well as subsequent to the commencement of any work . . . ."[21] This broad protection soon stimulated vigorous counter-pressures, and in 1838[22] this supplement was specifically repealed, the protected group was constricted in scope,[23] and procedural requirements were increased. But the basic lobbying strength of the privileged craftsmen[24] permitted them in 1840[25] to gain an extension of time for commencement of actions. In 1857 the legislature was induced to expand the scope of coverage to include not only "every house, or other dwelling"[26] but also every "bridge, mill . . . fixed machinery or gearing or other fixtures for manufacturing purposes, and every boat or other water craft . . . hereinafter erected or built within this state."[27]

By 1857 this statutory wording approximated the 1942 version of section 356 and for nearly a century thereafter little change was made in the text of this key section of the statutes. The only significant change during that period came in 1928 when the lien privilege was extended to architects.[28] Perhaps this long dormant period explains why the 1962 changes, which were incorporated under a deliberate technique

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[21]Laws of Mississippi 1824-1838, at 313. (Emphasis added.)

[22]Laws of Mississippi 1824-1838, at 866-67.

[23]Those listed in the previous acts but not to be found in the 1838 act are: bricklayer (though brick-maker is still listed, thus raising the question which arises again and again in tracing the history of the lien statutes of Mississippi as to whether the disparity is accidental or deliberate) joiner, ironmonger, blacksmith, plasterer and lumber merchant. However, where the 1821 act specified ". . . any other person or persons employed . . . ," this act substitutes therefor ". . . or other merchant, or mechanic. . . ."

[24]The counterpressures demonstrated between 1830 and 1840 are typical of the forces that have shaped in the past and that continue today to shape and reshape the lien laws of the several states. The motivations for exerting such pressures are predominantly selfish (in the McDougal-Lasswell terminology, "special interests") and show little orientation to the needs of the general community. The fact that from state to state different interests have at various times dominated the lobbies at the legislative forum is reflected in the multiplicity of prescriptions attempting to achieve similar purposes in the mechanics' lien field. Few, if any, of these statutes are deemed adequate.

[25]Hutchinson's Mississippi Code, 1798-1848, ch. 45, art. 7, at 627 (extending the time for commencing the action to enforce the lien to "within twelve months from the time payment should have been made. . . .").

[26]Miss. Rev. Code ch. 39, art. 1 (1857) (hereinafter cited as Code of 1857).

[27]*Ibid.*

[28]Miss. Laws 1928, ch. 137.

calculated to minimize the necessary changes in the wording,[29] were not initially thought to do more than to extend coverage to engineers, as the 1928 change had done for architects. Whatever the reason, it seems to have been generally assumed by the Bar, by the construction industry, and by the lending institutions that the 1962 amendment merely brought under the coverage of the act an additional skill or two, and so they have acted accordingly.

Other new provisions of a substantial and long-lasting importance were also incorporated into the Mississippi lien laws in 1857.[30] The two most significant were the specification limiting the lien privilege to the "contractor alone,"[31] and the provision for the "stop notice"[32] which has since been the source of much dissatisfaction and confusion. Under this "stop notice" provision, workmen or material suppliers not in direct privity with the owner were given only the limited privilege to bind undisbursed funds still in the owner's hands for payment of amounts due them by the contractor for their labor or materials supplied to the owner's property. The lien privilege itself was limited[33] to those in privity with the owner, which limitation is substantially the same as today's section 357.[34]

Between 1819 and 1857 industrial customs changed, interposing the prime contractor between workman and property owner. This development, together with the competitive struggle for privileged position, initiated the change which took place in the Mississippi statute. In only thirty-eight years the old statutes, which gave unpaid workmen a right against improved property as security for the labor or materials they had incorporated therein, were converted into a statute which specifically denied them such a privilege and transferred it instead to the prime contractor under whom they performed.[35]

In 1892 industrial and economic developments stimulated the extension of the prime contractor's lien rights to "every railroad and rail-

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[29]Letter from W. E. Morse, Attorney and Counselor at Law, Jackson, Mississippi, to author, Feb. 23, 1965: [whose firm had been retained to draft proposals for amending MISS. CODE ANN. § 356 (1956)] "Over a period of years I have found the easiest way to get a law passed is to amend a law and not try a new law. It does not always conform in every respect to what it would if you were writing a new law entirely, but if you can get what you want in by amendment you will not have the people fighting who have the protection of the old law. That was our thought in amending Section 356 of the Code of 1942. . . ."

[30]Code of 1857, ch. 39, at 327-330.

[31]See Code of 1857, ch. 39, art. 2.

[32]Code of 1857, ch. 39, art. 4.

[33]Code of 1857, ch. 39, art. 2.

[34]MISS. CODE ANN. § 357 (1956).

[35]*Compare* McLaughlin v. Green, 48 Miss. 175, 202 (1873), *with* Code of 1857, ch. 39, art. 2.

road embankment."[36] By this time several trends had become evident. One was toward a gradual broadening of the coverage of the act to more and more classes of subjected property, accompanied by a marked reduction in the number of classes of beneficiaries accorded the lien privilege. Another was toward a considerable expansion of the physical bulk of the statutory language. Not until 1928, when section 2580[37] (today's section 356) was expanded to include architects and architectural services, did the present reverse trend of extending the lien privilege to a wider range of participants begin.

One trend of considerable importance to a sound assessment of the effects of the 1962 amendment to section 356, is the increasing tendency to make and to repeat careless errors of commission and omission in drafting statutory amendments. For example, when the legislature incorporated the architect into the act in 1928, it somehow dropped from the clause outlining the scope of coverage, the word "railroad," though it retained "railroad embankment."[38] That omission continues to this day, though other portions of the section make it clear that railroads as well as their embankments are subject to liens.[39]

Another example of apparent carelessness was shown in 1930 when "boats and other water craft" were eliminated from section 2258[40] (today's section 356). However, such craft were not at the same time eliminated from section 2274[41] (today's section 372) which prescribed the "stop-notice" provisions available to subcontractors and others not in privity with the owner. Today's section 372 still includes "boats and other water craft." Consequently, a literal reading of the pertinent sections today would lead one to believe that a prime contractor had no lien rights against a boat which he had contracted to build, although his unpaid subcontractor or materialman could serve the owner with a stop-notice, proceed to judgment on the debt, and obtain a judgment lien on the boat. However, an examination of other statutory sections discloses that section 340[42] has since 1930 provided that "*all* persons in this state *have a lien* on all ships . . . and other water craft for work done or materials supplied concerning the building, repairing, fitting, furnishing, supplying or victualing"[43] of such craft. There is no stop-notice prerequisite to acquiring a lien under this section, nor any limitation restricting the protection accorded to those contractors in

[36]Miss. Ann. Code ch. 77, § 2698 (1892).

[37]Miss. Laws 1928, ch. 137.

[38]*Ibid.*

[39]See Miss. Code Ann. § 356 (Supp. 1964).

[40]Miss. Code Ann. §§ 2258, 2261 (1930).

[41]Miss. Code Ann. § 2274 (1930).

[42]Miss. Code Ann. § 340 (1956).

[43]Miss. Code Ann. § 2242 (1930). (Emphasis added.)

privity with the owner. Therefore, the continued inclusion today of "boats and watercraft" under the more restrictive section 372 would seem to be explained only by attributing the inclusion to the failure of the draftsmen to make a similar *débridement* from section 372 at the time the phrase was carved out of section 356 in 1930.[44] Since 1930 the inclusion may be attributed to a general oversight and failure to read the lien statute sections in relationship to each other. Too often superseded statutory provisions have remained as unused and forgotten remnants. Their reconstituted versions serve for a time the needs for which they were formulated and are undisturbed by any technical difficulties stemming from a literal reading of the unneeded vestige, until a further change in statute or environment suddenly brings them back to life to confound and bedevil the people they affect.

Evidence of long-tolerated failure to remedy such disparities[45] becomes particularly significant in considering whether the prima facie conflict between sections 356 and 357, which developed when the legislature amended section 356 in 1962 and was not clarified when they amended that section again in 1964, without making even the slightest change in section 357 either time, was merely the result of another negligent oversight or whether it was intended to be a deliberate retention of the restrictive provisions of section 357.

The impetus for this 1962 amendment came from the "Engineers' Association of the State,"[46] which felt that present day patterns of land development entitled them to be included in the list of those enjoying the priority allowed by the lien statutes. One of the attorneys in the firm retained by the Engineers to help draft favorable legislative amendments, wrote in answer to inquiry as follows:

> . . . [T]he Engineers' Association of the State, together with some of the materialmen and subcontractors, were bothered about the new subdivisions and their ability to collect for work done on new subdivisions outside the municipalities. . . . [T]he general plan of operation had been that a developer would take a piece of property, mortgage it heavily, employ engineers or

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[44]Miss. Code Ann. § 2258 (1930).

[45]The legislature provided a "stop-notice" privilege in Code of 1857, ch. 39, art. 2, that allowed sub-contractors and materialmen who were not paid for their labor or materials, upon proper notice, to block funds payable by the owner to the prime contractor until satisfaction was achieved by these subordinate contractors. It was not until 1906, however, that a clause was added (Code of 1906, ch. 81, § 3074) providing that any judgment acquired by the noticing party against the owner "shall be a *lien* from the date of such notice. . . ." Note that section 356 now specifies that its lien against the property is effective from the time of commencing suit to enforce the lien, or from the time of filing for record the contract under which the lien arose, or from the time of recording a notice of the contract.

[46]Letter from W. E. Morse to author, note 29 *supra*.

> surveyors to lay out his lots, . . . streets, sewers, . . . water lines and other utilities, and the statute provided no lien for those *individual* services.[47]

He commented further that section 356 of the Code of 1942 had last been amended in 1928 to protect architects who designed and built houses, and continued:

> . . . but the engineers who laid out the entire plan, made the estimates, and worked out the costs, were not protected. Neither were the contractors or materialmen who furnished, but that particular statute [section 356] came nearer to fitting into the picture for the protection of the contractors, *subcontractors,*[48] the surveyors, and engineers. . . .[49]

III. Comparison of the Pre-1962 and Post-1962 Section 356

Section 356, prior to the 1962 amendment, had provided that "Every house, building or structure . . . and any fixed machinery . . . shall be liable for the debt contracted and owing for labor done or materials furnished . . . ." Here was inserted, in 1962, the phrase "or architectural engineers[50] and surveyors or contractor*s* service rendered."[51] The act as amended thus read substantially as follows:

> Every house, . . . shall be liable for the debt contracted for and owing for labor done or materials furnished or architectural engineers and surveyors or contractors service rendered about the erection, construction, alteration, or repairs thereof. . . .[52]

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[47]*Ibid.* (Emphasis added.) It is obvious that land so improved has risen in value many times, and it is common knowledge that many such developments are ill-financed, with the major security being the improvements made to the land.

[48]By definition a sub-contractor cannot be in privity with the owner since that relationship would automatically make him a prime contractor. See Holt & Bugbee Co. v. City of Melrose, 311 Mass. 424, 426, 41 N.E.2d 562, 563 (1942).

[49]Letter from W. E. Morse, note 29 *supra.* (Emphasis added.)

[50]The 1928 amendment added "architects" to the coverage. The 1962 revision incorporated the term "architectural engineers" but neglected to continue the term "architects." Within the building industry the two terms are not synonymous, the former usually being employed by the latter (often licensed as engineers rather than as architects). In light of legislative history, and the fact that two sentences later the 1962 act refers to architects, one must attribute the discrepancy to careless drafting. But one realizes in noting a similar omission in the 1838 statute that the plasterers, etc., who were deleted at that time, never reappeared.

[51](Emphasis added.) The significance of the plural form of the word "contractors" here is heightened by reference to the letter from Mr. W. E. Morse indicating that the purpose of the 1962 change was to protect contractors and subcontractors. See note 48 *supra* and accompanying text.

[52]Miss. Laws 1962, ch. 488, § 1.

At the end of this clause, the description of lienable property was broadened in 1962 to include:

> . . . every subdivision . . . or subdivided property which required services, designs, or construction in designing or laying out of streets or subdividing or construction of streets, sewerage, water or other utilities, to be furnished by the said subdivision . . . or undivided lot . . . in connection therewith, ...[53]

Prior to 1962, the phrase immediately following this description of properties subject to lien had read: ". . . and *debt* shall be a lien thereon . . . ."[54] In 1962 this phrase was significantly altered to say: ". . . and debt *for such services or construction* shall be a lien thereon . . . ."[55] In 1962 a new sentence was next added, providing this specific statement:

> The architects, engineers, surveyors, laborers and materialmen and/or the contractors[56] *who rendered services or constructed* the improvements *shall have a lien therefor.*[57]

There is no qualification to the new sentence! It states clearly and concisely that such enumerated persons have a lien on the various types of property listed earlier in the section for services or construction of improvements thereon!

Were it not for past history and practice, a reading of this clause would leave no doubt that the parties named, including any contractors and materialmen, without specification as to whether they were prime- or sub-contractors, could have a lien on the property improved for their services, labor, or material. But since the clause represents a remarkable change from previous strict limitations on those to whom direct lien privileges were granted, a close examination must be made not only of the remaining portion of this section, but also of other pertinent sections of the statute before the apparent meaning of this portion of the statute can be depended upon as authoritative.

Further examination discloses that the paragraphs limiting lienable town property to an entire lot with its curtilage, and out-of-town property to one acre, were unchanged in 1962. Both versions of section 356 then continue:

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[53]*Ibid.*

[54]MISS. CODE ANN. § 356 (1956). (Emphasis added.)

[55]Miss. Laws 1962, ch. 488, § 1. (Emphasis added.) (Sentence structure was rearranged in 1964 when the statute was amended to include water-well drillers, but there was no significant rewording.)

[56]Note that the word "contractors" remains in the plural form here.

[57]Miss. Laws 1962, ch. 488, § 1. (Emphasis added.)

> If the structure be a railroad[58] or railroad embankment, the lien shall extend to and cover the entire roadbed and right of way, depots, and other buildings used or connected therewith. . . .[59]

But at this point, in 1962, the legislature added:

> [I]f the *services of the* architect, surveyor, engineer, laborers, *materialmen or of the contractors* shall be upon the whole subdivision, *the lien* shall extend to and cover the entire subdivision, but if a part only of the land is subdivided, and laborers, materialmen, architects, surveyors or engineers services are required and *contractors ARE* employed, then *the lien* shall extend to only that portion of said property upon which the services were required or upon or in connection with which the work done or the materials furnished [*sic*].[60]

After this new inclusion, the 1962 act returned to the 1942 wording for a time, continuing:

> Such lien shall take effect as to purchasers or encumbrancers for a valuable consideration without notice thereof, only from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose. . . .[61]

At this point the 1962 act provided an alternative procedure by adding the phrase ". . . or notice thereof . . ."[62] (*i.e.*, notice of the contract under which the lien arose). Both versions then specified that such filing for record was to be made in the office of the clerk of the chancery court, but three words were added to the end of the sentence in 1962, warning: *"as hereinafter stated."*[63] This paragraph then ends, in both the 1962 and 1964 versions, with the phrase advising that delivery is prima facie evidence of use in the job.

This "hereinafter" warning referred to the completely new subsection (b) of section 356, which provided for a new *Notice of Con-*

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[58]Note with reference to earlier remarks about careless drafting, that the first paragraph of both the 1962 and the 1964 version of Miss. Code Ann. § 356 (as amended) lack any reference to "railroad," which appeared immediately preceding "railroad embankment" from 1892 until 1928, but suffered inadvertent excision when the statute was amended to include "architect"; yet it continues to appear further on in the paragraph as shown here, having survived the attrition of 1928 to preserve a longevity dating from 1892.

[59]Miss. Code Ann. § 356 (1956); Miss. Code Ann. § 356 (Supp. 1964).

[60]Miss. Laws 1962, ch. 488, § 1. (Emphasis added.) Note that "contractors" is again plural and that materialmen and laborers are also specified in this clause. In 1964 the legislature eliminated the error in sentence structure that is apparent at this point in the 1962 act.

[61]*Ibid.*

[62]*Ibid.*

[63]*Ibid.* (Emphasis added.)

struction Liens book, to be started and kept by the chancery clerk.[64] It specified that "notices *under this act* shall be filed and recorded"[65] in this book. Therefore, after the effective date of this 1962 act, it became necessary, in order for liens under the act to take effect, to file "in said book . . . some notation thereof . . . ."[66]

Subsection (b) of section 356 mentions neither the *lis pendens* notice provided for in section 380,[67] nor the provisions for recordation of stop-notices as described in section 372,[68] and thus fails to answer the question of whether such notices may be effectively filed in the Notice of Construction Liens book. This in turn raises the question of whether such notices are acceptable alternative methods of providing adequate notice in those situations where they are pertinent, in place of complying with the notice provisions of section 356(b). Section (b) of this 1962 act *does* state in unequivocal language, immediately after providing for the Notice of Construction Liens book, "wherein notices under this act *shall be filed and recorded,*" that ". . . such liens, as provided *hereunder,*[69] *shall not take effect unless and until some notation thereof shall be filed and recorded in said book, showing a description* of the property involved, the name of the lienor or lienors, the date of filing, *if and where suit is filed, and if and where the contract is filed or recorded.*"[70] This provision seems to recognize the possibility that suit may have been filed at the time this notice is recorded, as well as the possibility that the contract may be recorded elsewhere, but it specifies that nonetheless, the "*liens . . . provided hereunder . . .*[71] shall not take effect *unless and until* some notation thereof shall be filed and

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[64]In Lafayette County, Mississippi, during October 1964, an official in the Office of the Chancery Clerk informed the author that he had instituted the new *Notice of Construction Liens* book a few months prior to that time upon the suggestion of one of the local attorneys that it "would be a good idea." It may be that the lines of communication on such matters are disrupted between legislature and county court clerk offices and that other changes also are put in practice through round-about pathways. Prior to inauguration of such a book in Lafayette County (and conceivably some counties even today may lack such a book) an appellate court might have found it necessary to dismiss an action under the statute for failure to comply with this recording prescription. There still seems to be some confusion as to what is properly recordable therein.

[65]Miss. Laws 1962, ch. 488, § 2. (Emphasis added.)

[66]*Ibid.*

[67]Miss. Code Ann. § 380 (1956).

[68]Miss. Code Ann. § 372 (1956).

[69]Note the use of the word "hereunder" at this point, as opposed to the word "hereinafter" used in the preceding paragraph of this section.

[70]Miss. Laws 1962, ch. 488, § 2. (Emphasis added.)

[71]"Hereunder" refers to "liens provided under *this* Act," meaning Miss. Laws 1962, ch. 488. Where the statute referred to something to follow, as in the last sentence of the first paragraph of the act, it used the word "hereinafter."

recorded in said [Notice of Construction Liens] book"[72] as specified. This is a specific statement, without provision for alternative methods of making effective the lien provided under this act, and it refers to all liens under the act, not merely those seeking priority over subsequent purchasers or encumbrancers for value and without notice. Such a record notice, therefore, is a prerequisite to perfecting any lien granted by the act. As to subsequent purchasers or encumbrancers for value without notice, the recording also sets the effective date when the lien shall take effect. As to others, however, the act merely states that the lien *"shall not take* effect unless and until" a notation thereof is filed in the Notice of Construction Liens book. As to these other unspecified parties, the interpretation is possible that the lien is not effective unless and until it is recorded as subsection (b) requires, but that once it is so recorded, it dates back to the date when liens normally become effective. To determine this date, it is necessary to look comparatively to other sections of the lien statutes and to case law for verification or refutation of the more obvious interpretation that no lien has an effective date other than the date of its recordation in the Notice of Construction Liens book. This obvious interpretation would appear to be in conflict with the concept to be derived from case law that the lien takes effect as of the date when the debt became due and payable.[73] Section 371 (unchanged in 1962 or 1964) states that liens created in *"this Chapter"* (of which section 356 is a part) "shall exist by virtue of the relation of the parties and without any writing, or if in writing, without recording; . . . ."[74] To the extent that it is not superseded by the requirements for recording set out in the 1962 version of section 356, this section would indicate that the liens exist by the nature of the relationship that finds one party furnishing labor or materials to another. However, one should also consider section 360 (unchanged in 1962 and 1964), which specifies that one entitled to and desiring to have the benefit of the lien provided in section 356 "shall commence his suit . . . within twelve months next after the time when the money due and claimed by the suit became due and payable, ..."[75] Case law also provides that action to enforce

[72]Miss. Laws 1962, ch. 488, § 2. (Emphasis added.)

[73]See note 76 *infra.*

[74]Miss. Code Ann. § 371 (1956). (Emphasis added.) "This Chapter" is ch. 5, Liens, of tit. 3.

[75]Miss. Code Ann. § 360 (1956). The original statute, passed in 1819, required that suit be commenced within six months from the commencement of the work or filing of the contract for record, but the 1840 act provided that persons wishing to avail themselves of the lien had to commence action, or to record the contract upon which the suit was founded, within twelve months from the time payment should have been made under the contract. In 1857 it was specified that to have the benefit of the lien provided, one had to commence suit within six months after the time when the money due and claimed by such suit became due and payable. In 1906 this limitation was extended to twelve months.

the lien must commence within twelve months after the amount claimed becomes due and payable.[76] It would seem wise at this stage to continue to count the time within which suit to enforce any construction lien can be commenced from the date when the amount claimed became due and payable, regardless of the date of filing in the Notice of Construction Liens book, though the effective date of the lien for purposes of establishing priority against other lienors is the date of the section 356 recording.

A summarization at this point would indicate (1) that the *lis pendens* notice and the stop-notice are not prerequisites to acquiring a lien today, and that they are not properly recordable in the Notice of Construction Liens book; (2) that contractors and materialmen may have a lien against the property though they are not in privity with the owner, if they meet the procedural requirements of subsection (b) of section 356; (3) that a subcontractor need not furnish a stop-notice as a prerequisite to acquiring a lien, though if he wishes to freeze funds due the prime contractor that are still under the owner's control, he must still use the stop-notice procedure provided in either section 372 or section 380; (4) that a *lis pendens* notice may still be necessary once suit is started, for full protection against subsequent bona fide encumbrancers or purchasers, but with a caveat that the similarity between the filing requirements created by section 356(b) and those called for in section 380 is sufficient to support an argument that the section 356(b) notice alone should suffice; and (5) that suit must be commenced within twelve months from the date when the amount claimed became due and payable, even though the recordation specified under section 356 as a prerequisite to the lien becoming effective may have occurred considerably later than the date when the amount became due and payable. However, it is not beyond expectation that the courts may require those not in privity with the owner to give a stop-notice in lieu of a "notice of intent to file lien" specification,[77] as a matter of public policy, to insure that the owner is not surprised by "hidden lienors" of the sub-contractor category of whom he has no knowledge.

IV. Consideration of Section 357

The major barrier to the interpretation advanced in the preceding paragraphs is the continued existence of section 357 in wording identical

[76]See Inerarity v. Wade & Co., 141 Miss. 552, 555, 106 So. 828, 829 (1926); Citizens' Lumber Co. v. Netterville, 137 Miss. 310, 316, 102 So. 178, 179 (1924); Ehlers v. Elder, 51 Miss. 495 (1875); Ivey v. White, 50 Miss. 142, 146 (1874). See also Drake Lumber Co. v. Semple, 100 Fla. 1757, 130 So. 577 (1930); United States v. Colotta, 79 So. 2d 474, 476 (Miss. 1955), *rev'd on other grounds*, 350 U.S. 808 (1955).

[77]*E.g.*, Ill. Rev. Stat. ch. 82, § 24 (1963); N.J. Stat. Ann. 2A: 44-71 (1952).

to that which it provided prior to 1962. The pertinent segment of this section reads as follows, in making direct reference to section 356:

> The lien declared in the foregoing section *shall exist only in favor of the person employed, or with whom the contract is made* to perform such labor or furnish such materials or render such architectural service, and his assigns; *and when contract is made by the owner,* or by his agent, representative, guardian, or tenant authorized, either expressly or impliedly, by the owner.[78]

On its face, this section seems unequivocally to limit the liens described in section 356 to those persons who perform labor or furnish materials or render architectural services under a contract directly with the owner or his authorized representatives. But since this section was not changed in 1962 or 1964, it is necessary to consider whether it continues to complement section 356 or whether the recent changes have made the two sections incongruous. Ordinary rules of interpretation dictate that where certain classes are expressly enumerated, those not enumerated are intentionally omitted. This logic forces the literal interpretation that section 357, since it does not specifically include engineers, surveyors, etc. in its list of those who may have a lien if in privity with the owner, must preclude them. But such a preclusion would put section 357 in direct contradiction with the title of chapter 488, which reads: "An Act to amend section 356 of the Code of 1942 which provides for a lien of laborers, materialmen and architects for work or services *to include a lien for engineers, surveyors and contractors,* and [to?] provide for notice."[79] If section 357 were applied to exclude "engineers, surveyors, and contractors" from the class privileged to have lien rights, it would render the title of chapter 488 not descriptive of the text of the act, which in turn could be held by the courts to void the provisions of the act entirely.[80] This certainly was not the intent of the legislature. The better interpretation is that the legislature, through simple oversight, neglected to update section 357 to keep it abreast of legislative desires as indicated by the changes made to section 356 in 1962 and 1964.

One might attempt to span this difficulty by interpreting the clause in question as being broad enough, though the words "perform . . . labor or furnish . . . materials" to include engineers, surveyors, and contractors *who are in privity with the owner.* But if this interpretation were to be accepted, it would completely negate the need for Chapter 488 in the first place, since it was passed, according to its title, to include within

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[78]Miss. Code Ann. § 357 (1956). (Emphasis added.)

[79]Miss. Laws 1962, ch. 488. (Emphasis added.)

[80]Miss. Const. art. 4, § 71; Levee Comm'rs v. Royal Ins. Co., 96 Miss. 832, 51 So. 2 (1910). *But see* Lewis v. Simpson, 176 Miss. 123, 129, 167 So. 780, 781 (1936).

the provisions of section 356 a "lien for engineers, surveyors, and contractors." If such parties are within the inclusion of section 357, correctly interpreted, they had to be there prior to 1962, for section 357 was not altered in 1962 or in 1964.

Legislative history sometimes clears up questions of difficulty involving statutory interpretation. The 1962 changes were first presented to the legislature as Senate Bill No. 2016. One of the attorneys who helped to author the bill, in answer to specific inquiry about the purposes for which the bill was intended, wrote:

> If you will notice the annotations on Section 356, a great deal of litigation grew out of this particular statute and the interpretation thereof, and the idea was to retain the interpretation of the statute insofar as had already been done by the courts and simply add the surveyors, engineers, *contractors and subcontractors,* etc. . . .[81] It probably would be better to amend Section 357 so as to broaden it and include the parties that had been named in Section 356.[82]

One possible reason why no amendment to section 357 has appeared to date might be discovered by extrapolating from the lines of an earlier letter solicited from the attorney who drafted the bill proposed by the Engineers, in which he describes the difficulty so often faced by those proposing remedial legislation:

> . . . Over a period of years I have found that the easiest way to get a law passed is to amend a law and not try a new law. *It does not always conform in every respect to what it would if you were writing a new law entirely,* but if you can get what you want in by amendment you will not have the people fighting *who have the protection of the old law.* That was our thought in amending Section 356 of the Code of 1942 . . . .[83]

It is difficult in the face of these comments and sound statutory interpretation to believe that section 357 is today intended to limit the lien privilege to those who enjoyed it under the 1942 statute. If one accepts the theory that the 1962 act did increase the list of those enjoying the privilege of a lien on property described in section 356, one must read that section comprehensively to extend the lien privilege to *all* those enumerated therein. Since it specifically includes materialmen and in several places uses the plural of the word contractors, (though before 1962 it had not been mentioned "contractors," but had instead merely listed services performed) and since the 1962 act continues

[81]Note the specific statement that the drafters intended to extend the lien right to subcontractors.

[82]Letter from W. E. Morse to author, March 25, 1965. (Emphasis added.)

[83]Letter from W. E. Morse to author, Feb. 23, 1965. (Emphasis added.)

"contractors" in the plural form even where it refers in the same phrase to "engineer" and "surveyor" in the singular, it makes the reference to "contractors and subcontractors" in Mr. Morse's letter[84] particularly significant. Industrial custom that channels the great bulk of its construction material through a principal, or prime, contractor rather than to the owner direct, and which seeks much of its skilled labor from craftsmen employed by, and whose work must be coordinated by, a general contractor, or a trade contractor, dictates that very little comfort is afforded the materialman or craftsman who can obtain a lien for his labor or material only if he contracts directly with the owner.[85] Such a limitation would, if widely recognized, invite materialmen and subcontracting parties to deal whenever possible directly with the owner. This tendency would destroy the entire concepts of responsibility and competitive bidding which are inherent parts of the construction practices in the United States. It would also jeopardize on-site co-ordination, thus reducing quality, increasing construction time, and raising costs. Such prescription, therefore, might very well be adjudged to be against public policy. In the newly-included field of land development, where the owner very often contracts the entire development operation to a professional developer, such an approach could, under the restrictive interpretation of section 357, eliminate not only materialman and subcontractor, but also architect, engineer, and surveyor from the list of those in privity, and could very well be employed collusively by an owner to isolate himself from all liens. This the legislature certainly could not have intended.

In 1964 the legislature again amended section 356 to "extend labor and materialmen's lien to water well drillers."[86] At this time, though it either saw no need to tamper with section 357, or neglected to consider it, the legislature found it desirable to improve the unwieldy phrasing of the 1962 version of the first paragraph of section 356. It re-wrote the first sentences to read:

> Every house . . . erected, constructed, altered, remodeled or repaired . . . *shall be liable for the debt contracted and owing,* for labor done or materials furnished, or architectural engineers[87] and surveyors or contractors service rendered about the erection, construction, alteration or repairs thereof; and *debt for such services or construction shall be a lien thereon.* The architects,

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[84]*Ibid.* See note 48 *supra* and accompanying text.

[85]The author speaks from personal experience here, having been in the retail building materials and the construction businesses for a number of years.

[86]Miss. Code Ann. § 356 (Supp. 1964).

[87]Note that the word "architect" still is missing from its proper place just ahead of "architectural engineers," whose designation here is questionable at best, though the next sentence gives the lien to architects and not to architectural engineers.

engineers, surveyors, laborers, and *materialmen, and/or contractors, who rendered services and constructed the improvements, shall have lien thereon.*[88]

It would seem difficult to word the statute any more clearly. It would also seem plausible that no responsible legislature could restructure a statute to the extent that the 1964 version restructured the 1962 edition of section 356 and in the process provide any more clearly than they had in the original version that all classes specified "who rendered services and constructed the improvements . . . shall have a lien . . ." if their intent was directly to the contrary. To interpret a new statute in such a way as to impute such a degree of carelessness to the legislature is contrary to custom as well as to wisdom.[89]

It is a much more logical interpretation, particularly in the light of other examples of failure to readapt related sections of the statute, to assume that the legislature, under the pressure of time, merely assumed that the bill accomplished what it purported to accomplish, as indicated by its title and by the textural material in the act. It would be blind obeisance to the past to continue to assume that section 357, which was last materially altered in 1892,[90] should negate the desire and the well-intentioned efforts of a legislature currently shouldering problems of heroic proportion in its efforts to meet the present needs of an expanding state.[91]

The sound interpretation is that those groups enumerated in section 356 have the privilege of direct liens resulting from services or materials they have furnished, but that they must file the necessary information for record in the Notice of Construction Liens book in the manner provided in order to acquire a valid lien. Once that is done, the lien takes effect from the date of the filing as against subsequent purchasers or encumbrancers for value without notice; it takes effect from the date the debt became due and payable as against all others.[92]

V. Other Areas of Confusion

It is not clear whether for full protection the *lis pendens* recordation called for under section 380 or the giving of the stop-notice under section 372 are also prerequisites to maximum priority and protection of interests of those upon whom the statute confers these special privi-

[88]Miss. Code Ann. § 356 (Supp. 1964). (Emphasis added.)

[89]*Cf.* Huber v. Freret, 138 Miss. 238, 248, 103 So. 3, 4 (1925).

[90]*Compare* Miss. Ann. Code, ch. 77, § 2699 (1892), *with* Miss. Code Ann. § 357 (1966).

[91]See Robertson v. Texas Oil Co., 141 Miss. 356, 106 So. 449 (1925).

[92]See note 75 *supra* and accompanying text. *But see* O'Leary v. Burns, 53 Miss. 171 (1876); Ehlers v. Elder, 51 Miss. 495 (1875).

leges. Nor is it clear whether this sub-contractor category of lienor must give notice of the contract between the owner and the prime contractor or notice of his own contractural relationship with one of these parties, in attempting to comply with section 356(b). A literal reading of subsection (b) would lead one to believe that it would be sufficient to file for record a description of the property involved, the lienor's name, date of filing, whether or not he has filed suit and where, and if and where the contract is filed or recorded.

Whether the inclusion of "sub-contractors" within the "contractors" category will be held to encompass those technically in a "sub-sub-contractor" class, is another question not yet dealt with on a sound policy level. The failure of the statute to make any such specific distinction may or may not be significant. Within the industry, whether one performs on any given project in a "sub-" or in a "sub-sub-" capacity may hinge primarily on the particular business relationships that will most expediently accomplish the successful completion of the project. The larger and more complex the job, the more entities will fall into a "sub-sub-" classification, so as to meet the dual needs to obtain necessary specialists and to insure clear lines of responsibility for proper coordination of activities. These decisions, if they affect the owner's desires and expectations at all, work to his benefit. It would seriously hamper any substantial construction project if all contractors had to insist upon a "sub-" category in order to avail themselves of lien rights. The purpose of a statute making such a distinction the basis of inclusion would seem to be merely that of arbitrarily selecting potential lienors piecemeal, using the criterion of status rather than a more purposeful one. And since on a given project one contributing participant may often perform in both "sub-" and "sub-sub-" categories, such a criterion seems even less sound. Yet in both case law[93] and statute[94] this distinction is often the basis used to limit the number of possible lienors.

In the case of *Gammill Co. v. Guesnard*,[95] the Mississippi Supreme Court concluded that a sub-sub-contractor could not give an effective stop-notice under section 2274 of the Code of 1930. Such holding is no longer realistic in light of present industry practices and customs, whereunder one's status is determined quite by chance and whereby one may act on the same job in a number of capacities. Competition and varied capacities within the bidding firms, coupled with job-site expediency, render distinctions such as are made between contractors, sub-contractors, and sub-sub-contractors mere arbitrary cut-off points. If builders

[93]Andrews & Johnson Co. v. Atwood, 167 Ill. 249, 47 N.E. 387 (1897); Hamilton v. Means, 155 Pa. Super. 245, 38 A.2d 528 (1944).

[94]PA. STAT. ANN. tit. 49, § 1201 (1963). *Contra*, N.Y. LIEN LAW § 2 (Supp. 1958); Ill. Laws 1895, § 228.

[95]167 Miss. 868, 150 So. 214 (1933).

have constantly to protect themselves by insuring specific categories of relationship with the person ultimately paying for the job, it could result in a considerable regressive movement in the efficiencies developing within the construction industry which is presently known for its lack of efficiency. One might, as an alternative, limit liens to those who have performed at the job site, but this solution would also discourage the promising trend towards off-site mechanized fabrication in many varied items. However, it is obvious that there should be a cut-off point somewhere in the present inter-related world which possesses apparently infinite capacity for specialized component fabrication and product acquisition. It is submitted that a good lien law today must therefore originate in a re-thinking of the current goals to be achieved by such statutes. It is also to be remembered that because of uniform pay practices that prevent the "mechanic" from going beyond one work week without pay and an increasing shortage of skilled craftsmen who are increasingly unionized, the original purpose for the lien law statutes no longer exists.

VI. Conclusion

Certainly there is need for considerable clarification at the legislative level. Pending a wholesale re-evaluation by the legislature, one might predict that the courts, recognizing the past patterns of careless legislative omissions and desiring to avoid additional confusion that could result from piecemeal interpretations superimposed upon a patchwork statute considerably endangered by recent modifications, would be constrained to prescribe that in cases of conflict between statutory sections, the latest in time would prevail.[96] This action by the courts would be particularly appropriate in view of the fact that the legislature had met once since passing the key changes made in 1962 and had not seen fit to make any revisions returning to earlier patterns, but instead had further expanded the coverage of the crucial segments of the statute.[97]

Mississippi has in the past enjoyed a relatively effective lien law quite well adapted to its environment. The social and economic patterns had changed slowly over the last century, and until lately the law was not much abused by being tampered with. But of late the special interest groups in the state have begun to play the game which has created so much havoc in other states, that of kicking the lien law around in every

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[96]Green v. Hutson, 139 Miss. 471, 104 So. 171 (1925); *cf.* Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925); State *ex rel.* Knox v. Wyoming Mfg. Co., 138 Miss. 249, 103 So. 11 (1925); Vicksburg v. Sun Mutual Ins. Co., 72 Miss. 67, 16 So. 257 (1894).

[97]See Miss. Code Ann. § 356 (Supp. 1964).

session of the legislature.[98] The net result can only be, as it has been in other states, that after a time the original purposes for such statutes are negated by the scrambles of lobbyists to gain an advantage for or to protect from encroachment a position of some privilege enjoyed by the interests they represent. The general community goals and the balancing of interests for the good of the community as a whole, which are a vital element in all legislation, become lost in the shuffle. It is then the function of the courts to maintain as effectively as possible those overriding goals that benefit the community at large.

The courts may be hard put to maintain a reasoned position on mechanics' lien questions in Mississippi until the necessary studies and remedial legislation are passed. The position calculated to be least disruptive over a period of time, most reasonable in light of present day needs and standards and practices, and easiest to reconcile with further revisions which may be generated by these of recent vintage, will be that of literal interpretation of section 356, recognizing it as the will of the legislature, coupled with a holding that provisions latest in time will govern *in cases of conflict.*

It is reasonable to assume that subcontractors and materialmen may desire to proceed under section 372[99] to bind contract funds still under the owner's control. If so, an interesting question is raised as to whether their recovery would be limited by the provision of section 372 which states that the owner is not liable for an amount greater than that originally contracted for. Under the lien provided by section 356, there is no such express limitation, and an action brought thereunder might permit a lien to be carried to a foreclosure sale under which the total indebtedness would be recovered regardless of any amount already paid to the prime contractor by the owner.

Section 380,[100] applicable equally to those entitled to file a stop-notice or to a lien, is permissive in nature and probably would still be held to give notice of the lien, if its requirements were met. This section, too, contains a limitation-of-liability phrase keyed to the amount of the original contract. Since the notice requirement of section 356 is mandatory, and since as record notice it calls for the same information as that generally required under section 380, it hardly seems likely that lienors would prefer section 380 unless the courts indicated a marked disparity between the extent of reach of section 380 and section 356. Nor does it seem likely that the courts could interpret a Notice of Con-

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[98]See, *e.g.*, Letter from John D. McCarthy, Executive Vice-President, Illinois Lumber & Material Dealers' Ass'n, to author, Sept. 18, 1962: ". . . [W]e had had attacks on our position in every session of the legislature. . . ."

[99]Miss. Code Ann. § 372 (1956).

[100]Miss. Code Ann. § 380 (1956).

struction Liens book record as insufficient notice to the owner or to others interested in the property.

The crucial question, from the standpoint of contestants with a recognized lien, is whether the changes in section 356 will be held to supersede sections 372 and 380 to an extent that would negate the provisions in the latter limiting liability of the owner to the original amount of the contract, regardless of how the disbursements are sliced. Although section 356 has no similar provision, it must be remembered that neither did it have such prior to 1962.

Prior to 1962 there was no need for such a provision, since sections 372 and 380, which supplied this qualification, clearly coordinated with and related back to section 356. But today the areas of conflict between them leave this correlation open to doubt. The courts may reconcile the problem by reasoning from the concept that changes of prescription will be found only where there are areas of conflict, in which case the prescription latest in time will prevail. This would allow them to be consistent in their basis for interpretations. The courts may recognize, in light of the fact that the recent amendments do not directly infringe upon this particular limitation, and in the absence of any apparent attempt to amend section 356 or any other section with regard to this limitation, that no conflict exists over this issue. The courts may therefore hold that the "original contract" limitations remain in effect. This would tend to soften to some degree the impact of the other changes. Furthermore, it would allow Mississippi to continue its status as a state limiting its mechanics' liens to the amount of the original contract, and by so doing avoid the need to turn to court interpretations of other states where the contrary is true. Such an interpretation would demand of the subcontractor a responsible level of diligence in credit extension and provide an incentive for him to give direct notice to the owner, via the stop-notice procedure in those cases where he feared a default by the prime contractor, in order to prevent disbursement of funds until liens at the subcontractor level were reconciled. But it would also make the property security for the improvements in cases where the owner's financial status was dubious. It would not give the subcontractor sufficient additional protection to lead him into even more careless credit extensions than he is notorious for now. And it might cause the owner to be more diligent in assuring that payments made to the prime contractor were channeled down to their proper recipients, if only because no one cares to find his property subjected to mechanics' liens. Such goals might be reasonable, though imperfect, for a new mechanics' lien law in Mississippi, since they tend to balance all interests and to distribute both benefits and burdens. If so, the courts may determine that the 1962 act did, artfully or inadvertently, amend the lien law to the point where it again serves quite well the needs of the state.

But there are still considerable areas of difficulty, and one must realistically understand that anything less than a routine, statutorily required notice of participation in a job, as a substitute for the stop-notice prerequisite to lien rights, will be generally ignored by subcontractors and materialmen because an arbitrary notice is tantamount to public questioning of the financial stability of one's major customers. In fact, the promise to refrain from exercising arbitrary rights of this sort often becomes a *quid pro quo* to obtain business. The history in other states creates reasonable expectations that more piecemeal amendment will be the fare for Mississippi as well. Therefore, it will not be wise or safe to rely upon the agility of the courts to maintain balance through constant statutory interpretation which sooner or later may run afoul of itself.

It is time to create a serious group to operate with maximum support of both industry and the government, for the purpose of providing Mississippi with a sound and workable lien statute, before the industrial revolution radically changes the face of much of the state. There may come a time when such a statute will be impossible to achieve.[101]

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[101]See, *e.g.*, Letter from Hugh O. Tomkins, Managing Director, New Jersey Lumbermens' Ass'n to author, Oct. 25, 1962: ". . . We have had a number of conferences between ourselves and the New Jersey Home Builders, and they naturally resist any effort to change the law in any way that would, in their opinion, adversely affect their membership. Consequently, amendment of the law in New Jersey, if it was needed, would be rather difficult, unless full accord could be achieved amongst the interested groups. . . ."; Letter from Donald J. Moe, Secretary-Manager, Michigan Retail Lumber Dealers' Ass'n to author, Oct. 25, 1962: ". . . Major obstructists to a more liberal lien law, from the suppliers' standpoint, are lending institutions and the large scale builders. . . . Although we've been fighting to preserve the lien law in its present form, primarily because it's better than we had before 1953, it is technical chaos personified. The first sentence runs for one and one-half pages, with phrases patched on phrases. . . ." During the six years that the author of this article served on the Board of Directors of the Illinois Lumber and Material Dealers' Ass'n, the major effort made regarding lien laws was to preserve what existed against attacks which occurred at every session of the legislature. That the law in Illinois remained during that time substantially unchanged was due primarily to a balance of power among the contending lobby groups.

Application of the Marital Deduction to Joint and Mutual Wills

*Bertel M. Sparks**

Since its enactment in 1948, the so-called marital deduction provision of the Internal Revenue Code has furnished one of the most often discussed and most intriguing aspects of the federal estate tax.[1] In its essence the marital deduction as it applies to federal estate taxes is nothing more than a provision exempting from the tax the amount, not to exceed one half of the adjusted gross estate, which passes from a decedent to his or her surviving spouse.[2] If the Code provision stopped at that point, it would be comparatively simple, but there are qualifications. One qualification is that in order to be eligible for the marital deduction the interest passing to the surviving spouse must be in the nature of a fee simple absolute; that is to say, it must not be one that will terminate or fail upon the happening of any event certain or uncertain.[3] But that qualification is itself qualified by a further provision authorizing the inclusion within the marital deduction of the entire value of any asset in which the surviving spouse is given a life estate plus a general power of appointment whether the power is presently exercisable or is exercisable by will only.[4]

Within these provisions and restrictions taxpayers are still trying to find ways whereby they can dispose of their property in a way to assure its qualification for the deduction and at the same time (1) retain control

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[1]The literature on the subject is much too extensive to be catalogued here and it is doubtful if any useful purpose would be served by such a catalogue anyway. The following items are listed as illustrative only: Casner, *Estate Planning Under The Revenue Act of 1948,* 62 HARV. L. REV. 413 (1949); Casner, *Estate Planning—Marital Deduction Provisions of Trusts,* 64 HARV. L. REV. 582 (1951); Fleming, *Present Status of the Marital Deduction,* 33 TAXES 167 (1955); Golden, *A Decade with the Marital Deduction,* 97 TRUSTS & ESTATES 304 (1958); McLucas, *Marital Deduction for Estate Taxes,* 86 TRUSTS & ESTATES 445 (1948); Molloy & Woodford, *The Revenue Act of 1948,* 34 VA. L. REV. 501 (1948); Pedrick, *The Revenue Act of 1948—Income, Estate and Gift Taxes—Divided They Fall,* 43 ILL. L. REV. 277 (1948); Sargent, *To Each His Own,* 93 TRUSTS & ESTATES 933 (1954); Sugarman, *Estate and Gift Tax Equalization—The Marital Deduction,* 36 CALIF. L. REV. 223 (1948); Surrey, *Federal Taxation of the Family—The Revenue Act of 1948,* 61 HARV. L. REV. 1097 (1948); Trachtman, *Leaping in the Dark,* 93 TRUSTS & ESTATES 922 (1954).

[2]INT. REV. CODE OF 1954, § 2056.

[3]INT. REV. CODE OF 1954, § 2056(b)(1).

[4]INT. REV. CODE OF 1954, § 2056(b)(5).

of its disposition upon the death of the survivor and (2) prevent its being included within the survivor's taxable estate. Some taxpayers thought they had found success through the power of appointment device only to discover that in order to qualify under that exception the surviving spouse must be given an uncontrolled power.[5] Such a power clearly eliminates the first decedent's ability to dictate the ultimate disposition and at the same time places the property in the survivor's taxable estate. About the only measure of control left in the first decedent is that he can provide for a taker in default of appointment and then die in the hope, but it is only a hope, that the power will never be exercised.

Efforts have been made to qualify an interest for the power-of-appointment exception to the terminable interest rule by using something less, but only slightly less, than a general power. Where a surviving spouse is given a life estate with broad powers to consume and there is a gift over of what remains at her death, her economic position is not substantially different, and in some respects is better, than if she had been given a life estate with a general testamentary power of appointment and there was a gift over in default of appointment. The life estate subject to a general testamentary power to appoint qualifies for the marital deduction, not because it is a non-terminable interest, but because it is the subject of a specific exception made in the Code.[6] Since no such exception is made for a life estate with a power to consume and since a life estate is clearly a terminable interest, it cannot qualify for the deduction unless the power is so broad that it can be construed as a general power to appoint.[7] Local law must be applied in that construction process and it is not often that a power to appoint to oneself or one's estate will be implied from a power to consume, however broad the language of the instrument creating the power may be.[8] Even though the life tenant is made the sole judge of what may be consumed[9] or is given "full power to use, enjoy, sell or dispose . . . for such purposes or in such manner as she in her uncontrolled discretion may choose,"[10] a gift over of what remains at her death is sufficient to

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[5]Peyton's Estate v. Commissioner, 323 F.2d 438 (8th Cir. 1963); Commissioner v. Ellis, 252 F.2d 109 (3d Cir. 1958); Pipe's Estate v. Commissioner, 241 F.2d 210 (2d Cir. 1957).

[6]See INT. REV. CODE OF 1954, § 2056(b)(5).

[7]Treas. Reg. § 20.2056(b)-5(g)(3) (1958); Note, 71 HARV. L. REV. 381 (1957).

[8]See Peyton's Estate v. Commissioner, 323 F.2d 438 (8th Cir. 1963); Commissioner v. Ellis, 252 F.2d 109 (3d Cir. 1958); Pipe's Estate v. Commissioner, 241 F.2d 210 (2d Cir. 1957).

[9]Commissioner v. Ellis, 252 F.2d 109 (3d Cir. 1958); Stedman v. United States, 233 F. Supp. 569 (D. Mass. 1964).

[10]Pipe's Estate v. Commissioner, 241 F.2d 210 (2d Cir. 1957).

restrict her to a standard of good faith, thereby preventing her power from being absolute.

But the desire to use the power to consume rather than a general power of appointment does not have any necessary relationship to the tax consequences involved. A husband is likely to have independent reasons for his desire to give his wife the broadest possible powers of use, disposition, and control within her own life without giving her any testamentary powers and without permitting the property or its proceeds to fall into her estate. In furtherance of this desire he is likely to give the wife a life estate and clothe her with a power to consume at her own whim and in a way suitable to herself and even to make gifts in reasonable amounts and for reasonable purposes. Such a gift, however, cannot qualify for the marital deduction because it does not include an unrestricted power in the wife to appoint to herself or her estate. If the husband is properly advised of this fact prior to his death, he can be expected to search for a scheme that will not only qualify, but will also carry out his testamentary desires concerning his wife. He might even enter into a contract with his wife whereby the wife agrees that she will make a will disposing of her entire estate in a certain manner. If the husband can be assured of the enforceability of the contract, he is free to make an absolute devise or bequest to the wife with the assurance that anything that remains at the wife's death will be controlled by the terms of the contract. The contract might be one whereby both husband and wife agree to make a will of a certain tenor. The husband might agree to leave his entire estate, or a designated part thereof, to his wife provided she survives him and to his nephew Henry if the wife fails to survive. The wife agrees to make the husband the beneficiary of her will and to make Henry an alternative beneficiary in the event of the husband's failure to survive the wife. The respective promises of husband and wife are consideration for each other. If the husband executes a will pursuant to the contract and predeceases the wife, it has been held that the interest passing to the wife qualifies for the marital deduction in spite of her contract to dispose of it in a certain manner.[11]

The question suggested to the estate planner is whether this contractual arrangement can safely be utilized (1) to give a surviving wife the substantial economic equivalent of a power to consume while

[11]Most of the cases on the point seem to have involved property held in joint tenancy or by the entireties. McLean v. United States, 65-2 U.S.T.C. ¶ 12,326 (6th Cir., Dkt. No. 15, 944, March 2, 1965), *affirming* 224 F. Supp. 726 (E.D. Mich. 1963); United States v. Spicer, 332 F.2d 750 (10th Cir. 1964); Estate of Awtry v. Commissioner, 221 F.2d 749 (8th Cir. 1955). But whether the property is held jointly or severally would seem to be immaterial for this purpose. Estate of Vermilya, 41 T.C. 226 (1963).

retaining in the husband the power of ultimate disposition of what is not consumed and (2) to create in the wife an interest that will qualify for the marital deduction. It should be recognized at the outset that this question is far different from asking whether an interest passing to a surviving spouse by way of a joint or mutual will qualifies for the marital deduction. In order to understand the significance of that difference or to predict the tax consequences in either situation, it is essential that both the concept of joint and mutual wills and their contractual possibilities be thoroughly understood.

Strictly speaking there is no such thing as a joint will;[12] that is to say, a will cannot have joint operation such as a deed or contract executed by joint grantors or obligors. By its very nature a will is necessarily a one-party instrument and it necessarily concerns the winding up of an individual's affairs at his death. As a will it might provide for the disposition of property, the appointment of an executor, the appointment of a guardian, or the doing of any combination of these things. But in each instance an individual's affairs must be wound up and an individual's estate must be distributed. The term "joint will," then, is nothing more than an effort to describe the separate wills of two persons written on the same piece of paper and executed by each of them. There is only one writing, and it is often phrased in such language as "This is *our* will, . . . *we* dispose of *our* property," and similar expressions. Thus it is joint in form, but it can never be joint in operation. When the first maker dies, the document is offered for probate as his will. Upon the death of the survivor the same document may be offered for probate as the survivor's will. Even if the joint makers are joint tenants of the property being disposed of and even if they die at exactly the same instant, there are still two separate wills, two separate estates to be administered, and two groups of creditors and other claimants to be satisfied.[13]

The misunderstanding concerning the nature of joint wills and the inconvenience of having one document serve two purposes are sufficient reasons for discouraging their use altogether. The desired objectives can be more satisfactorily achieved through the execution of two separate wills, and separate wills should be used even though their provisions are so similar that they reveal on their face that they were

[12]This truth was recognized at least as early as 1775 when Lord Mansfield remarked, "Now there cannot be a joint will." Darlington v. Pulteney, 1 Cowp. 260, 268, 98 Eng. Rep. 1075, 1079 (1775).

[13]Probably the best illustration of the complete separateness of the two wills written in joint form is a case holding that although each maker signed the writing only once, and that as maker, the one signature could serve the dual purposes of maker of his or her own will and attesting witness to the will of the other. *In re* Estate of Lee, 225 Cal. App. 2d 578, 37 Cal. Rptr. 572 (1964).

executed in conjunction with each other. Two wills having this degree of similarity are referred to as "mutual wills." They are usually executed by husbands and wives and are usually reciprocal in nature, with each maker designating the other as primary beneficiary and providing for a common alternative beneficiary if the primary one predeceases the maker. The wills are usually in almost identical language, drafted by the same lawyer, executed on the same day, and frequently employ the same group of attesters. In spite of all these similarities between the two, there is nothing peculiar or unique about them and certainly nothing peculiar or unique about their operation. Whether a will is a joint will, a mutual will, or one that is joint and mutual, it is still a will. The fact that one will is so related to another that the two can be described by the terms "joint" or "mutual" does not alter their quality as wills. Each one remains a unilateral, one-party, revocable document. In spite of the many assertions to the contrary, that quality of revocability is not altered except by the death of the maker. Where a husband and wife have executed joint or mutual wills and the husband dies first with his will still in effect, the devise or bequest to the wife passes to her in exactly the same way as if his will had been the only one executed. And after the wife has accepted the benefits under the husband's will, there is nothing to keep her from revoking her own will the following day.[14]

Since the fact of a joint or mutual will does not within itself impose any restriction upon the interest passing under the will of the first maker to die, it necessarily follows that the qualification of the interest for the marital deduction is not affected either. If the interest passing under the will of the first to die would have qualified in the absence of any will by the surviving spouse, it will qualify in spite of such will. But it is possible that spouses executing joint or mutual wills might enter into contracts concerning them. These contracts might impose upon the survivor an obligation to perform certain acts with reference to the property passing under the will of the first to die. Whether that contractual arrangement affects the qualification of the legacy or devise for the marital deduction is a more serious question. The resolution of that question requires an examination of the nature of a contract to make a will and a consideration of the obligation imposed by such contracts.

A simple contract to make *a* will disposing of the estate of one promisor is less complicated and more easily related to fundamental principles than is a contract whereby each of two people agree to execute a will, the two wills to have reciprocal provisions. While contracts for single wills take many forms, a frequently used one and one

[14]See Lynch v. Lichtenthaler, 85 Cal. App. 2d 437, 193 P.2d 77 (1948); Elmer v. Elmer, 271 Mich. 517, 260 N.W. 759 (1935); Loflin v. Capps, 327 P.2d 443 (Okla. 1958); Paull v. Earlywine, 195 Okla. 486, 159 P.2d 556 (1945).

that serves well for illustrative purposes is a contract for services. An uncle might enter into a contract with his nephew by which the uncle promises to devise or bequeath his entire estate to the nephew in exchange for the nephew's rendering certain personal services to the uncle. Such a contract does not impose upon the uncle any duty to have an estate, but it does impose upon him a duty to leave such estate as he does have to his nephew. So long as the uncle lives, he is entitled to the reasonable use of his assets and may consume them for his support and maintenance.[15] The marketability of his title remains undiminished.[16] He is free to mortgage his property in the regular course of his business,[17] to invest and reinvest any or all of it,[18] and, in the absence of bad faith, is not liable for losses that might result.[19] He is also free to make gifts in reasonable amounts and for reasonable purposes.[20] But he is not entitled to give the property away for the purpose of defeating the nephew's anticipated benefit,[21] nor can he, even in the utmost good faith, give away large or unreasonable amounts.[22] Thus it can be seen that the economic position of a promisor who has entered into such a contract is remarkably similar to that of a life tenant with a power to consume.

The uncle in the situation described above has assumed a contractual obligation to leave a will in favor of his nephew. But since a will is ineffective until death and is revocable up until that time, there is no obligation to make a will at any particular time, nor would a promise

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[15]It has even been held that after making a contract to will one's entire estate, the promisor may validly contract with a third person to devise a specific tract of land included within the estate in return for support and maintenance of the promisor. Smith v. McHenry, 111 Kan. 659, 207 Pac. 1108 (1922).

[16]Needham v. Kirkman, 3 Barn. & Ald. 531, 106 Eng. Rep. 755 (1820).

[17]National Life Ins. Co. v. Watson, 141 Kan. 903, 44 P.2d 269 (1935).

[18]Noble v. Metcalf, 157 Ala. 295, 47 So. 1007 (1908).

[19]See Fourth Nat'l Bank v. First Presbyterian Church, 134 Kan. 643, 648-49, 7 P.2d 81, 84 (1932).

[20]Noble v. Metcalf, 157 Ala. 295, 47 So. 1007 (1908); Ohms v. Church of the Nazarene, 64 Idaho 262, 130 P.2d 679 (1942) (upholding a gift of more than one-half the estate and indicating that both the relationship of the promisor to the promisee and the purpose of the gift are factors to be considered in determining what is reasonable); National Life Ins. Co. v. Watson, 141 Kan. 903, 44 P.2d 269 (1935); Fourth Nat'l Bank v. First Presbyterian Church, 134 Kan. 643, 7 P.2d 81 (1932) (relying upon what was considered an especially meritorious purpose to justify a gift of almost one-sixth of the estate); Dickinson v. Lane, 193 N.Y. 18, 85 N.E. 818 (1908).

[21]Whiton v. Whiton, 179 Ill. 32, 53 N.E. 722 (1899); Chantland v. Sherman, 148 Iowa 352, 125 N.W. 871 (1910); Eaton v. Eaton, 233 Mass. 251, 124 N.E. 37 (1919); Huffine v. Lincoln, 52 Mont. 585, 160 Pac. 820 (1916).

[22]Lawrence v. Ashba, 115 Ind. App. 485, 59 N.E.2d 568 (1945); Skinner v. Rasche, 165 Ky. 108, 176 S.W. 942 (1915); Riddell v. Riddell, 146 La. 37, 83 So. 369 (1919); Quinn v. Quinn, 5 S.D. 328, 58 N.W. 808 (1894).

to do so be of any effect if it were made.[23] The uncle might neglect to make any will at all, he might make one pursuant to the contract, he might make one inconsistent with the contract, or he might make one pursuant to the contract and later revoke it and execute a new and inconsistent will. In any event the last will is the one entitled to probate, and if no will is executed or if the last one executed is later revoked, there is nothing to probate.[24] If the uncle dies leaving a valid will in compliance with the contract, he will have performed his part of the bargain. If he leaves no will or if he leaves an inconsistent will, he will have breached his contract and the nephew will have an appropriate contract remedy. That remedy might be in quantum meruit for the value of the services rendered, an action at law for damages, or in some circumstances an appropriate equitable remedy. The equitable remedy would probably be the most suitable one in this case. The nephew should be entitled to the value of his bargain; that is to say, the value of the thing promised. The thing promised is the net value of the uncle's estate. An action at law with a trial to a jury would not present a suitable forum for an estate accounting. That difficulty in ascertaining damages should be sufficient grounds for equitable jurisdiction.[25] In an equitable proceeding an accounting could be had and a suitable award made to the nephew. The important point to note here is that if there is a breach, the remedy is in contract, not in efforts to probate a will that does not exist. If the uncle has dissipated his estate by making wrongful inter vivos transfers, such transfers may be set aside and the property recovered if it has not fallen into the hands of bona fide purchasers.[26]

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[23]See *In re* Houser's Estate, 178 Neb. 401, 133 N.W.2d 618 (1965) (holding that the statute of limitations does not begin to run against an action in quantum meruit for the value of services rendered by the promisee in performance of a contract to make a will until the death of the promisor).

[24]The fact that the last will is inconsistent with an earlier will made pursuant to a contract should not affect the admission of the last will to probate. *In re* Rolls' Estate, 193 Cal. 594, 226 Pac. 608 (1924); *In re* Isaacson's Estate, 77 Idaho 12, 285 P.2d 1061 (1955); Manrow v. Deveney, 109 Ind. App. 264, 33 N.E.2d 371 (1941); *In re* Adkins' Estate, 161 Kan. 239, 167 P.2d 618 (1946); Sumner v. Crane, 155 Mass. 483, 29 N.E. 1151 (1892); Morgan v. Sanborn, 225 N.Y. 454, 122 N.E. 696 (1919); Van Vlack v. Van Vlack, 181 Ore. 646, 182 P.2d 969, *rehearing denied* 185 P.2d 575 (1947); Hobson v. Blackburn, 1 Add. 274, 162 Eng. Rep. 96 (1822). For further analysis of the probate remedies available as well as a consideration of the cases reaching results inconsistent with the principles stated here, see SPARKS, CONTRACTS TO MAKE WILLS 124-34 (1956).

[25]See Grant v. Grant, 63 Conn. 530, 29 Atl. 15 (1893); *In re* Peterson, 76 Neb. 652, 107 N.W. 993 (1906), *aff'd and explained on rehearing* 76 Neb. 661, 111 N.W. 361 (1907).

[26]Whiton v. Whiton, 179 Ill. 32, 53 N.E. 722 (1899); Johnson v. Soden, 152 Kan. 284, 103 P.2d 812 (1940); Skinner v. Rasche, 165 Ky. 108, 176 S.W. 942

Regardless of the remedy pursued by the nephew, his principal problem is likely to be that of proving the contract. In addition to his difficulties with the "dead man statutes," the courts have created other problems for him by adopting a rule that contracts to devise or bequeath will not be enforced unless they can be proved by "clear and convincing" evidence.[27] Since the nephew has rendered faithful and very likely arduous services during the uncle's lifetime, there is good reason for a feeling that the uncle ought to have rewarded him. But moral duty, however strong and compelling, does not impose a legally enforceable obligation.[28] It is a contractual claim against the estate that is being enforced.

Where there is a provable contract, if the uncle leaves an appropriate will thereby making the action unnecessary, it is clear that the will is made in satisfaction of what would otherwise be a claim against the estate. That being the case, there is no reason why the property should be included in the uncle's estate for estate tax purposes.[29] This conclusion seems clearly correct, and the scarcity of case law on the subject can probably be explained (1) by the fact that contracts of this type usually involve small estates and (2) by the very strong probability that where the estate is large enough to be taxable, the executor pays the tax voluntarily and the question is never raised. The Commissioner

(1915); Getchell v. Tinker, 291 Mich. 267, 289 N.W. 156 (1939); Bower v. Daniel, 198 Mo. 289, 95 S.W. 347 (1906); Schramm v. Burkhart, 137 Ore. 208, 2 P.2d 14 (1931); Daniels v. Aharonian, 63 R.I. 282, 7 A.2d 767 (1939); Swingley v. Daniels, 123 Wash. 409, 212 Pac. 729 (1923); Allen v. Ross, 199 Wis. 162, 225 N.W. 831 (1929).

[27]This requirement has been expressed in a variety of ways and is supported by innumerable cases only a few of which will be cited here. Moumal v. Walsh, 9 Alaska 656, 662 (1940) ("clear, satisfactory and convincing"); Rolls v. Allen, 204 Cal. 604, 608, 269 Pac. 450, 452 (1928) ("most indisputable"); Soho v. Wimbrough, 145 Md. 498, 510, 125 Atl. 767, 771 (1924) ("definite and certain, strong and convincing"); Open v. Aurien, 352 Mo. 592, 600, 179 S.W.2d 1, 4 (1944) ("a very high degree of proof"); Cox v. Williamson, 124 Mont. 512, 525, 227 P.2d 614, 621 (1951) ("clear, cogent, and convincing"); Stafford v. Reed, 363 Pa. 405, 410, 70 A.2d 345, 348 (1950) ("clear, precise and indubitable"). A few courts apparently require that a contract to make a will be proved beyond reasonable doubt, thus applying a standard similar to the one required for proof of guilt in criminal cases. Matthews v. Blanos, 201 Ga. 549, 563, 40 S.E.2d 715, 726 (1946); Salmon v. McCrary, 197 Ga. 281, 285, 29 S.E.2d 58, 60 (1944); Brickley v. Leonard, 129 Me. 94, 97, 149 Atl. 833, 835 (1930); Bicknell v. Guenther, 65 Wash. 2d 726, 399 P.2d 598, 602 (1965).

[28]See Sullivan v. Dumaine, 205 A.2d 848 (N.H. 1964).

[29]See Estate of Feder, 22 T.C. 30 (1954) (not involving a contract to make a will but holding that the amount of a valid and enforceable claim was deductible even though the claimant actually took as legatee under a bequest that was conditioned upon no claim being filed); *In re* Greiner's Estate, 412 Ill. 591, 107 N.E.2d 836 (1952); Sullivan v. Margetts, 9 N.J. Super. 189, 75 A.2d 743 (1950).

of Internal Revenue is the party who should object to having a legacy included in the uncle's estate for estate tax purposes. The nephew performed services and the benefit he received from the will was delayed income for those services. As such it should be excluded from the uncle's estate and taxed as ordinary income to the nephew.[30]

But when an effort is made to fit joint and mutual wills into the principles outlined above, additional complications are introduced and the tax results that follow are not necessarily the same. As this problem is approached, it is important to remember again that no peculiar tax problems are created by joint or mutual wills as such. The wills may or may not be executed pursuant to a contract, and if any unique tax problems are created, they will be created by the contract, not by the wills. The often repeated statement that joint and mutual wills are irrevocable is without foundation, and so is the even more generally held notion that although they are revocable so long as both parties are alive, the will of the survivor becomes irrevocable upon the death of the first to die. The execution of such wills does not impose upon either party any obligation not to revoke, nor does any such obligation arise when the first party dies and the survivor accepts the benefits under his or her will.[31] Obligations of this kind can arise only if there is a contract, and there can be no contract unless the parties consciously bargained to that effect and complied with all the requirements for the formation of a simple contract.

A contract might be entered into concerning joint or mutual wills as well as other types of wills. The contract then becomes an independent legal relationship having an existence separate and apart from the wills. Either party may still revoke his or her will without the consent of the other but neither of them may unilaterally rescind the contract without incurring a liability for breach. Although a unilateral rescission of the contract is impossible, the two parties may get together and agree to rescind at their mutual pleasure. As soon as one party dies with the contract still in effect, rescission by the survivor becomes impossible. It is impossible, not because it concerns a will and not because it concerns joint or mutual wills, but because it is a contract which, like all other contracts, cannot be rescinded without the concurrence of both parties to it. Any suggestion that the relationship is revocable so long as both parties are alive but becomes irrevocable as soon as one of them dies

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[30]See Cotnam v. Commissioner, 263 F.2d 119 (5th Cir. 1959). A different result was reached in *Mildred E. McDonald*, 2 T.C. 840 (1943), where a legatee had rendered personal services to the testator. Although the opinion in that case is not entirely clear, the decision appears to have been based on the absence of sufficient evidence of a contract. For that reason, it is doubtful if *McDonald* is authority on the point here involved.

[31]See cases cited note 14 *supra*.

is inaccurate, whether it is applied to the wills or to the contract. The wills are always revocable.[32] The contract is never revocable but may be rescinded by the mutual consent of the parties. If one party undertakes to rescind the contract, even while the other party is living, the attempted rescission will be ineffective and the contract may still be enforced.[33]

The same problems encountered in proving the existence of a contract to make a will in return for services are present in the proof of contracts for joint or mutual wills. The same standard of clear and convincing evidence is required and in order to satisfy that standard something more than the mere execution of wills having reciprocal provisions is necessary.[34] It is only natural for husbands and wives to discuss their testamentary plans with each other. And it is not unusual that they should arrive at an understanding or agreement concerning common or reciprocal provisions in their respective wills. Such discussions and such understandings between persons of close affinities, especially between husbands and wives, are not unusual, and the fact that they have taken place is no indication that there has been any thought of a binding contract. This statement is true whether the two wills are entirely separate documents or whether they are united into one writing. There are occasional suggestions that joint wills have a greater tendency to prove the existence of a contract than do separate wills with similar provisions.[35] This is especially the case where such pronouns as "we," "our," and "us" are used[36] or where the property being disposed of is held by the entireties[37] or where it is referred to as joint property though actually held in severalty.[38] But even here the better reasoned cases have taken the position that such language is nothing more than the normal and natural usage of two people attempting to execute two wills as one

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[32]For a case giving special emphasis to the fact that there is no such thing as an irrevocable will see Allen v. First Nat'l Bank of Batesville, 230 Ark. 201, 321 S.W.2d 750 (1959). See also cases cited note 24 *supra.*

[33]Trindle v. Zimmerman, 115 Colo. 323, 172 P.2d 676 (1946); Brown v. Webster, 90 Neb. 591, 134 N.W. 185 (1912); *In re* Fischer's Estate, 196 Wash. 41, 81 P.2d 836 (1938) (enforcing the contract against the estate of the first to die without even suggesting a right of rescission).

[34]See cases cited note 39 *infra.* This rule has occasionally found its way into statutory form, *e.g.*, Colo. Rev. Stat. § 153-5-40 (1963).

[35]Frazier v. Patterson, 243 Ill. 80, 90 N.E. 216 (1909) (holding that the execution of a joint will with reciprocal provisions is sufficient proof of the existence of a contract); Seat v. Seat, 172 Tenn. (8 Beeler) 618, 113 S.W.2d 751 (1938).

[36]Campbell v. Dunkelberger, 172 Iowa 385, 153 N.W. 56 (1915); Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915).

[37]Seat v. Seat, 172 Tenn. (8 Beeler) 618, 113 S.W.2d 751 (1938).

[38]Baker v. Syfritt, 147 Iowa 49, 125 N.W. 998 (1910).

document.[39] It indicates that the parties discussed their testamentary plans and agreed upon a certain scheme of disposition, but it is completely silent as to whether or not a contract has been entered into.

It has already been suggested that joint wills should be avoided entirely. Separate mutual wills cannot be avoided, but the danger of expensive litigation can be reduced by including in every such will a clause declaring that it was or was not executed pursuant to a contract. Such clauses should be clear and specific and should be drafted with extreme care. A contract is not proved by a statement in the wills requesting that the survivor of the two parties make a particular disposition,[40] or a statement that the parties have "agreed" to the disposition for,[41] or that one will was executed "in consideration" of the other.[42] It shoud also be remembered that even the clearest of statements on the face of a will is not conclusive evidence of the truth of the statement.[43] For this reason, it is wise, if there is a contract, that the contract itself be in writing as a separate document and that it be signed by both parties.

If a contract for the making of either joint or mutual wills can be proved, there is a binding obligation upon each party to the contract to die leaving in effect the promised will. That obligation was created when the contract was entered into but cannot be breached until the death of the obligor. If the contract is breached, the promisee or the third party beneficiary as the case may be has available to him an assortment of remedies similar to those available to the promisee of the contract for a will in return for services. If the husband dies first with

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[39]See Rolls v. Allen, 204 Cal. 604, 269 Pac. 450 (1928) (the court declaring that the execution of joint wills with reciprocal provisions had no tendency to show the existence of a contractual obligation); Jacoby v. Jacoby, 342 Ill. App. 277, 96 N.E.2d 362 (1950); Menke v. Duwe, 117 Kan. 207, 230 Pac. 1065 (1924); Glidewell v. Glidewell, 360 Mo. 713, 230 S.W.2d 752 (1950); *In re* Gudewicz' Will, 72 N.Y.S.2d 838 (Surr. Ct. 1947); Ginn v. Edmundson, 173 N.C. 85, 91 S.E. 696 (1917); Loflin v. Capps, 327 P.2d 443 (Okla. 1958); *In re* Rhodes' Estate, 277 Pa. 450, 121 Atl. 327 (1923); Hoffert's Estate, 65 Pa. Super. 515 (1917) (not influenced by a provision in the will that, "Whereas we have agreed to and with each other . . . ."); Williams v. Rhode Island Hosp. Trust Co., 88 R.I. 23, 143 A.2d 324 (1958). *Contra,* Frazier v. Patterson, 243 Ill. 80, 90 N.E. 216 (1909); Culver v. Hess, 234 Iowa 877, 14 N.W.2d 692 (1944); Lewis v. Lewis, 104 Kan. 269, 178 Pac. 421 (1919); Doyle v. Fischer, 183 Wis. 599, 198 N.W. 763 (1924).

[40]Hays v. Jones, 122 Fla. 67, 164 So. 841 (1935) (joint will); *In re* Quaranta's Estate, 109 N.Y.S.2d 637 (Surr. Ct. 1952) (mutual will with reciprocal provisions).

[41]Hoffert's Estate, 65 Pa. Super. 515 (1917).

[42]*In re* Estate of Pennington, 158 Kan. 495, 148 P.2d 516 (1944).

[43]Polak v. Polak, 248 Wis. 425, 22 N.W.2d 153 (1946). But such a statement is some evidence of the contract, and acceptance of a legacy under a will containing such a statement might be considered such an acquiescence in the statement as to estop the legatee from denying the existence of the contract. McGinn v. Gilroy, 178 Ore. 24, 165 P.2d 73 (1946).

the promised will in favor of his wife still in effect, he is leaving a will in satisfaction of what would otherwise be an enforceable claim against his estate. It would appear that if the reasoning of the contract-for-services cases should be followed, the legacy should not be included in the husband's estate for estate tax purposes but that it should be regarded as ordinary income to the wife.[44] There is no indication that the specific point has been argued in the cases, but it does appear from the results reached that the courts have taken a rather uniform position that although the legacy is given in satisfaction of a claim against the estate, it is nevertheless a part of the estate for federal estate tax purposes.[45] Such a paradox appears to be a contradiction of terms and the courts have not offered any rationalization for their position. It is submitted, however, that the position taken is a sound one and that a viable rationalization can be found. In order for a claim to be an allowable deduction for estate tax purposes, it must have been contracted "for an adequate and full consideration in money or money's worth."[46] The only consideration received by the husband for his promise to make a will in favor of his wife was the wife's promise to make a similar will in favor of her husband in the event he survived her. There is no question but that such mutual promises are sufficient consideration to support the contract, but that does not necessarily mean that the "money or money's worth" requirement of the Code is satisfied. Since the husband did not receive anything from the wife that can be valued and added to his estate prior to or at the time of his death, it would appear that the requirement is not satisfied and that the assets remaining in his estate up until his death should be subject to the estate tax even though they are disposed of in fulfillment of an obligation. That rationalization has not been used by the courts, but it is in accord with the results they have reached.

Once it is decided that the husband's entire property is included in his estate in spite of the contract concerning the will, the next question is whether or not that part of it passing to the wife qualifies for the marital deduction. At this point there will be encountered the wife's obligation concerning the disposition of the assets at her death. So far

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[44]See note 30 *supra* and accompanying text.

[45]Each of the following cases involved a joint will and in each case the husband died first. In each instance both the existence of a contract between the spouses and the inclusion of the husband's property in his estate for estate tax purposes was assumed without argument by all parties concerned. United States v. Spicer, 332 F.2d 750 (10th Cir. 1964); Estate of Awtry v. Commissioner, 221 F.2d 749 (8th Cir. 1955); McLean v. United States, 224 F. Supp. 726 (E.D. Mich. 1963), *aff'd*, 65-2 U.S.T.C. ¶ 12,326 (6th Cir., Dkt. No. 15,944, March 2, 1965); Schildmeier v. United States, 171 F. Supp. 328 (S.D. Ind. 1959); Estate of Vermilya, 41 T.C. 226 (1963).

[46]INT. REV. CODE OF 1954, § 2053(c)(1)(A).

as the husband's will is concerned the bequest to the wife was absolute. But even prior to the wife's receiving it, she was under a contractual obligation to give it to a third person at her death. That obligation was assumed when the spouses entered into a contract to make wills in favor of each other, each will to contain an alternative disposition to a named third person in the event the named spouse failed to survive. The wife as the surviving spouse has the continuing obligation to the third person. If she breaches her contract either by failing to leave an appropriate will or by making improper inter vivos transfers, the third person will have an appropriate remedy.[47] The right of the wife to the use and enjoyment of the property is comparable to that of the promisor of a contract to make a will in return for services, which in turn is comparable to that of a life tenant with the power to consume. This gives the surviving spouse's estate all the appearance of a terminable interest. But the decisions on the subject indicate that the interest is not terminable and that it does qualify for the marital deduction.[48] On this point, if emphasis is placed upon the economic position of the surviving wife, the power-to-consume cases appear to be in direct conflict with the contractual will cases. But if attention is centered upon the manner in which the transfer takes place, it is believed that the differing results can be justified.

The earliest contractual joint and mutual will cases to raise the marital deduction problem involved property the husband and wife held jointly or by the entireties. There it was held that although the contract could impose an obligation upon the surviving joint tenant, it could not change the nature of the tenancy. Therefore, the complete ownership enured to the surviving tenant upon the death of the first to die. Such complete ownership was considered a non-terminable interest which by definition qualified for the deduction.[49] The survivor's obligation to dispose of it in a certain manner at his or her death resulted from a collateral undertaking voluntarily entered into by the survivor. And although that obligation was assumed by the wife prior to the husband's death, it was not a part of the title-transferring process. Whether or not an interest qualifies for the marital deduction depends upon how and to whom the title is transferred and not upon a collateral undertaking by the transferee.

Even if the property being disposed of is the separate property of

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[47]See SPARKS, CONTRACTS TO MAKE WILLS 50-161 (1956).

[48]See notes 49-50 *infra.*

[49]United States v. Spicer, 332 F.2d 750 (10th Cir. 1964); Estate of Awtry v. Commissioner, 221 F.2d 749 (8th Cir. 1955); McLean v. United States, 224 F. Supp. 726 (E.D. Mich. 1963), *aff'd*, 65-2 U.S.T.C. ¶ 12,326 (6th Cir., Dkt. No. 15,944, March 2, 1965); Schildmeier v. United States, 171 F. Supp. 328 (S.D. Ind. 1959).

the respective spouses, if the husband dies first, the wife's obligation to the third person arises out of the contract and not the husband's will. The will transferred to the wife a non-terminable interest in the nature of a fee simple. The wife's obligation concerning that interest depends upon the contract and not the will. The contract was not a part of the title-transferring process but was an independent, collateral undertaking. This line of reasoning appears to eliminate any basis for a distinction between jointly held property and separate property for this purpose, and such has been the decision where the question has been raised.[50]

The importance of the title-transferring process as a basis for the decision is further emphasized by a case holding that where the husband devises property to his wife upon condition that she agree to dispose of it in a certain manner, the interest does not qualify for the marital deduction.[51] Here the wife's obligation concerning the property might be identical with the obligation that could have been created by a prior contract for mutual wills. But in one instance the obligation was imposed by the will, the instrument transferring title,[52] and in the other it was created by an independent undertaking.[53]

Thus it appears that so long as the courts continue to follow the cases decided thus far and there is no amending legislation, taxpayers can achieve through contracts for mutual wills what they cannot achieve through either a qualified bequest or a power to consume. Under the contractual arrangement, a husband and wife may enter into a contract whereby the husband binds himself to leave his entire estate or a definite portion thereof or a stated sum of money to his wife, and the wife binds herself to leave the same property or an identified part thereof to a third person. When the husband dies with the promised will in effect, the wife receives the property, but she receives it subject to her contractual obligation. She is free to use the property and to consume whatever is appropriate for her support and comfort. She is not free to give it away except in reasonable amounts and for reasonable purposes.

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[50]Estate of Vermilya, 41 T.C. 226 (1963).

[51]Allen, Ex'x v. United States, 242 F. Supp. 687 (E.D.N.Y. 1965).

[52]In the *Allen* case the obligation was actually assumed by the wife's executing the required agreement subsequent to the husband's death. But the will made the signing of such an agreement by the wife a condition precedent to her receiving her legacy.

[53]In the contractual joint and mutual will cases it is clear that the will of the first spouse to die does not pass any interest, either contingent or otherwise, to any person other than the surviving spouse. The rights given to the third party beneficiary are given by the contract, an instrument that became operative and beyond the control of the decedent at the time it was executed. The contemplated instrument for the performance of that aspect of the contract is the will of the surviving spouse.

She has no power of appointment. When she dies the property must go to the third party beneficiary of the contract either by the wife's will or by the beneficiary's enforcement of the contractual right. In spite of all the restrictions upon the wife's control of the property, the bequest qualifies for the marital deduction. If the parties do not enter into any contract but the husband devises his entire estate to his wife for life and gives the wife a power to consume for support and comfort with a gift over of what remains at her death, the wife's actual rights to the property will be almost identical with her rights in the contractual will case. In spite of the striking similarity between the two cases, the life estate with a power to consume does not qualify for the marital deduction. The differing results reached cannot be justified by any functional differences between the power to consume and the contractual will. In both circumstances the surviving widow is restricted to standards of reasonableness and good faith in the use of her property. Except for what she can accomplish within those standards, all that is left at her death must go to the designated third person. In both situations the property is included in the husband's estate for federal estate tax purposes. But in one instance the gift qualifies for the marital deduction and in the other it does not. The distinction is a formal one based on methodology rather than one of substance based on function. But it is a formal distinction created by Congress, not by the courts. The Code deals with property transfers and makes no specific provision for contracts to make wills.[54] Contracts can easily have a substantial impact upon the property rights of a transferee without being made a part of the title-transferring process. A skillful use of such arrangements might enable taxpayers to gain advantages that are not available through powers or other devices.

If the taxpayer's goal is that of achieving the benefit of the marital deduction without surrendering the ultimate disposition of the property

[54]This is clearly accurate so far as the express language of the Code is concerned and no provision has been found from which it appears that any other conclusion can be reasonably inferred. There is a curious provision in the Treasury Regulations that "The deduction may not be taken with respect to a property interest which passed to such spouse . . . subject to a binding agreement by the spouse to dispose of the interest in favor of a third person." Treas. Reg. § 20.2056(e)-2(a) (1958). The Tax Court has considered this regulation and has expressly held that it does not apply to general or residuary bequests to a surviving wife who has previously contracted with her husband to leave the property thus received to third persons at her death. Estate of Vermilya, 41 T.C. 226 (1963). While the decision was confined to general and residuary legacies and devises, it is difficult to see why any different result should be reached even if specific items were involved. *Id.* at 233 (concurring opinion). It appears more likely that the regulation applies only to those cases where the will itself makes the gift to the spouse subject to a condition precedent that she make such an agreement. This was done in Allen, Ex'x v. United States, 242 F. Supp. 687 (E.D.N.Y. 1965).

to the whim of the surviving spouse, the current decisions indicate that joint and mutual wills made pursuant to contract can provide a ready answer. But in spite of the favorable atmosphere thus far revealed, there is much to suggest caution. There are a number of points that have not been seriously argued, and when they are presented, some of the current holdings might be overruled or their significance neutralized. When the husband dies first, leaving in effect his mutual will made pursuant to a contract, there is still room for argument as to whether the property passing under that will should be included in his estate for tax purposes at all. Up to this point it has been assumed that it should be. But if that assumption is seriously challenged before a court that is not favorably impressed with the money-or-money's-worth argument, it is possible that there could be a holding that such a bequest is not part of the husband's estate but is instead ordinary income to the wife.

Even if it is settled that the property is included in the husband's estate, its qualification for the marital deduction is not sufficiently certain to justify the kind of reliance called for by careful estate planning. In spite of the uniformity of the current holdings and in spite of their doctrinal soundness, less than half of the circuit courts have ruled on the matter and there is yet no decision by the Supreme Court. A holding that a legacy of the type here considered does not qualify for the deduction is quite possible and could be supported by emphasizing the nature of the wife's interest rather than the means by which she acquired it. The functional similarity of that interest to a life estate with a power to consume is so great that a decision that the two should get the same tax treatment would not be entirely surprising.[55]

Once it is clearly established that a legacy received by a surviving spouse under a mutual will made pursuant to a contract qualifies for the marital deduction even though the contract requires the legatee to dispose of it in a certain manner, there are further questions that need to be answered but which have not yet been litigated. A few of these difficulties will be indicated here in an effort further to demonstrate that the present state of the authorities is not adequate for planning purposes.

The fact that the surviving spouse is not free to give the property to herself or to her estate tends toward the conclusion that it should not be included in her estate for estate tax purposes. But that tendency is probably an illusion. It has very little substance unless it is assumed that the interest held by the surviving spouse is in the nature of a

[55]This conclusion has in fact been reached by a lower state court applying a state statute that is almost identical with the federal provision. The decision appears to be based upon the erroneous notion that the will and the contract are inseparable, but it illustrates the kind of uncertainty created by arrangements of this type. Estate of Manganiello, 45 Misc. 2d 268, 256 N.Y.S.2d 388 (Surr. Ct. 1965).

power of appointment. But that theory appears to have been repudiated by the cases holding that it qualifies for the marital deduction in the estate of the first spouse to die. These decisions have been based on the theory that the surviving spouse receives a fee and that her contract is her own voluntary act.[56] No power of any kind is involved. The fact that the contract preceded the receipt of the property has not prevented its qualification for the marital deduction. If the same doctrine is applied to the estate of the surviving spouse, there appears no reason why the property should not be included in that estate.

If the property is not included in the estate of the surviving spouse, even graver problems are presented. Upon what theory may it be excluded? The exclusion cannot be based on the rule applicable to powers of appointment because no power is involved. Since the third party beneficiary of the contract will have a claim against the estate of the survivor, it is possible that the legacy should be treated as being in satisfaction of a claim against the estate and excluded on that basis. That theory was rejected as inapplicable to the estate of the first to die because the claim against that estate was not "for an adequate and full consideration in money or money's worth."[57] But the money-or-money's-worth argument can hardly be raised in the estate of the survivor because adequate and full consideration did pass upon the death of the first spouse to die. In spite of its being the subject of a claim based upon adequate and full consideration, however, the legacy cannot be ordinary income to the third party beneficiary. He was not a party to the contract and did not give any consideration of any kind. As to him the benefit received must be either a legacy or a gift. If its being the subject matter of a claim prevents the benefit from being a legacy, there is still the possibility that it might be treated as a gift. If it is a gift, when did the gift take place and who was the donor?

The uncertainties concerning the above questions and others that could be raised, all of which must be decided by future litigation, should be sufficient to indicate that in the present state of the authorities contracts to make mutual wills are not prudent arrangements for estate tax planning purposes. And even if all the uncertainties could be resolved in a manner favorable to the taxpayers, the contractual scheme should still be avoided. If future litigation should establish a sufficient degree of predictibility to justify prudent planning in that direction and should the practice become widespread, congressional intervention would become almost a certainty. The result would be a necessary revision of numerous wills and the inevitable frustration of the plans of many

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[56]See cases cited note 45 *supra.*

[57]See note 46 *supra* and accompanying text.

testators who might die after the effective date of the legislation and before their wills were revised.[58]

In addition to all the objections already stated, there remains the fact that very few taxpayers are likely to accept the degree of rigidity demanded by a mutual will made pursuant to contract. It requires an unconditional commitment at a time when most property owners are likely to want to preserve unlimited flexibility. It should be avoided except in those limited areas where its use can be justified on non-tax grounds and where the testator fully understands its meaning and is prepared to make such an irrevocable commitment concerning his estate.[59]

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[58]The situation might be compared with the failure of the earlier versions of the estate tax law to make provision for property subject to powers of appointment. In spite of Treasury Regulations to the contrary, it was held that under this legislation property passing under the exercise of even a general power of appointment was not includable in the estate of the donee. United States v. Field, 255 U.S. 257 (1921). No doubt many taxpayers availed themselves of the opportunity thus afforded to save on estate taxes. But there is no way to estimate how many taxpayers suffered as they were caught up in the subsequent web of statutory amendments and conflicting interpretations. Some of the history of this episode is found in Angell, *The Impact of the Law of Powers Upon Our Internal Revenue Laws,* 39 MICH. L. REV. 1269 (1941); Buck, Craven & Shackelford, *Treatment of Powers of Appointment for Estate and Gift Tax Purposes,* 34 VA. L. REV. 255 (1948); Craven, *Powers of Appointment Act of 1951,* 65 HARV. L. REV. 55 (1951); Griswold, *Powers of Appointment and the Federal Estate Tax,* 52 HARV. L. REV. 929 (1939); Leach, *Powers of Appointment and the Federal Estate Tax—A Dissent,* 52 HARV. L. REV. 961 (1939).

[59]A few circumstances under which a contract to make a will might be desirable without reference to any tax saving possibilities are considered in SPARKS, CONTRACTS TO MAKE WILLS 187-200 (1956).

Mutuality in Collateral Estoppel: Never the Twain Should Meet

*Lee Davis Thames**

Long before the exigencies of the crowded dockets of today, jurists perceived the need for an end to litigation, whether it be a single case or several attempts to litigate the same issues. Out of this vision evolved the doctrine of res judicata, which inheres in the legal system of all civilized nations. The doctrine is predicated upon both public policy and the interests of the litigants, and is succinctly stated in 30A *American Jurisprudence, Judgments,* § 324:

> [A]n existing, final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

In order to avail himself of this doctrine a party must show the court in which it is pleaded that four conditions exist: "(1) identity in the thing sued for; (2) identity in the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in the persons for or against whom the claim is made."[1] These four identities are quite restrictive, and it became evident that there were situations needing coverage that would not meet all four conditions. One such situation is when the same parties are involved in a second action that involves some of the same fact questions previously litigated, but that is predicated upon an entirely different cause of action.

Courts soon began recognizing the need for modifying the doctrine of res judicata, and took steps to achieve that end. Two separate rules evolved, one precluding the relitigation of the same causes of action, and the other precluding the relitigation of the same issues. Both the requirements and the consequences of the two rules differ. When a party is precluded from relitigating the same cause of action, he is precluded from relitigating even those issues which could have been properly decided, but which were not specifically decided in the original suit. A party precluded from relitigating a specific issue, however, may raise issues in the second action which could properly have been, but were not, raised in the first action. Unfortunately for clarity of thought and uniformity of application, the two rules have been

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[1]See, *e.g.*, Palmer v. Clarksdale Hosp., 213 Miss. 611, 57 So. 2d 476 (1952).

lumped together under the term "res judicata" or "estoppel by judgment." Often the doctrine precluding the relitigation of the same issue has been called "collateral estoppel," but this classification does not clarify matters, because of the large number of cases still referring merely to res judicata. Since the Mississippi courts have wisely attempted to differentiate by using the term "collateral estoppel," this same term will be used to describe that theory or doctrine precluding the relitigation of the same issue.

With collateral estoppel, the generally accepted rule is that only two conditions need exist in order for a party to utilize it: (1) the same issue previously decided in an earlier action terminated by a final judgment on its merits; and (2) an attempt to relitigate that issue between the same parties or their privies. While these two conditions often can be met, even this doctrine has proven to fall short of the needs of the courts in preventing the relitigation of identical issues, the attendant use of valuable trial time, and the uncertainty as to the finality of judgments.

Courts have traditionally relied upon the theory that both parties should be mutually bound by the first judgment before either might invoke it against the other as res judicata or collateral estoppel. For a long while the only exception to this rule was that privies were bound as parties, and this is hardly an exception. As cases arose that exhibited the inadequacy and inequity of such a restriction, the courts begrudgingly created additional exceptions.

One of those exceptions is normally referred to as derivative liability. This exception holds that one whose liability is derived from a party to the original action is precluded from relitigating the same issues in a subsequent action. A case that illustrates this situation well is *Richardson v. Erwin.*[2] In that case *X* brought action against *Y* for damages to *X* resulting from an auto accident wherein *Y*'s son had been driving *Y*'s car. In an earlier action *X* had brought action against *Y*'s son alleging the same negligence as in the second action. In the earlier action there was a verdict against *X* and in favor of *Y*'s son. *Y* pleaded that judgment in the second action although he was not a party to the first action. The Supreme Court of Kansas sustained the plea of *Y* pointing out that *Y*'s liability, if any, was derived entirely from his son, and since it had been previously adjudicated that *Y*'s son was not negligent, *X* could not now relitigate the same issue.

Another phase of this exception, the indemnitor-indemnitee relationship, is often cited as a separate exception. Regardless of whether it is denominated a facet of the derivative liability exception or a separate exception in its own right, the fact remains that the existence

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[2]174 Kan. 314, 255 P.2d 641 (1953).

of this relationship will permit the one to preclude another from relitigating the same issue previously litigated against the other. The court in *Hawley v. Davenport, R.I. & N.W. Ry.*[3] presents a good discussion of the indemnitor-indemnitee relationship within the context of derivative liability.[4]

The exception (or exceptions) have not cured the problem of the effective application of collateral estoppel in the dynamic way that is required. They are, rather, symptomatic of the basic issue: Is mutuality really necessary for a just and equitable use of collateral estoppel? The answer is unequivocally negative.

I. Why Mutuality?

The cases are legion that require mutuality before collateral estoppel must be applied, but only a handful have ever questioned the need for mutuality or attempted to ascertain why it is required in the first place. It is to be remembered that the "mutuality" referred to is the requirement that both the party raising the plea of collateral estoppel and the party against whom it is being used must be mutually bound by the prior judgment which is the basis of the collateral estoppel plea. If the courts have been slow to analyze and slower to criticize, such is not the case with text writers. One of the earlier criticisms was by Jeremy Bentham and has been oft-quoted, but bears repeating:

> Another curious rule is, that, as a judgment is not evidence against a stranger, the contrary judgment shall not be evidence for him. If the rule itself is a curious one, the reason given for it is still more so:—"Nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary:" a maxim which one would suppose to have found its way from the gaming-table to the bench. If a party be benefited by one throw of the dice, he will, if the rules of fair play are observed, be prejudiced by another: but that the consequence should hold when applied to justice, is not equally clear. This rule of mutuality is destitute of even that semblance of reason, which there is for the rule concerning *res inter alios acta.* There is reason for saying that a man shall not lose his cause in consequence of the

[3]242 Iowa 17, 45 N.W.2d 513 (1951).

[4]For other derivative liability cases see: Mooney v. Central Motor Lines, Inc., 222 F.2d 572 (6th Cir. 1955); Miller v. Simons, 239 Minn. 523, 59 N.W.2d 837 (1953); Spitz v. Be Mac Transp. Co., 334 Ill. App. 508, 79 N.E.2d 859 (1948); Phinnix v. Griffin, 221 N.C. 348, 20 S.E.2d 366 (1942); Thirty Pines, Inc. v. Bersaw, 92 N.H. 69, 24 A.2d 500 (1942); Canin v. Kesse, 20 N.J. Misc. 371, 28 A.2d 68 (1942); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937); Fightmaster v. Tauber, 43 Ohio App. 266, 183 N.E. 116 (1932); Siratt v. City of River Oaks, 305 S.W.2d 207 (Tex. Civ. App. 1957). See also 30A Am. Jur. *Judgments* §§ 393, 415, 426 (1958); 35 Am. Jur. *Master and Servant* § 534 (1955).

> verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he was a party, merely because his adversary was not. It is right enough that a verdict obtained by *A* against *B* should not bar the claim of a third party *C;* but that it should not be evidence in favour of *C* against *B,* seems the very height of absurdity. The only fragment of a reason which we can find in the books, having the least pretention to rationality, is this, —that *C,* the party who gives the verdict in evidence, may have been one of the witnesses by means of whose testimony it was obtained. The inconclusiveness of this reason we have already seen.[5]

The learned authors of the *Restatement of Judgments* still seem to be relying upon the reasons dealt with so severely by Jeremy Bentham as they state the basis of the rule to be:

> Relitigation of an issue with a new adversary is permitted because of the assumed unfairness of binding one party to a proceeding by the rules of res judicata while the other party is not bound; where there is a new adversary who was not privy to the first action, since the second adversary would not be bound by the rules of res judicata, the person who was a party to the first proceeding should not be bound either.[6]

One of the leading cases questioning the need for mutuality is *Coca-Cola Co. v. Pepsi-Cola Co.*[7] The court pointed out that the only basis for the requirement that could be found was in American and English Encyclopedia of Law where it was stated that the requirement was based upon "that fundamental principle that no man can be deprived of his property except by due process of law. . . ."[8] This same rationale was used by the court in the very early Mississippi case of *Lipscomb v. Postell,*[9] but the court went on to define the type of due process of law about which it was speaking: a party must be able to make a defense, offer evidence, cross-examine witnesses, or appeal.

These are the only two reasons that are advanced in support of the requirement of mutuality, but an analysis of both reveals that neither is a justification for the requirement. Jeremy Bentham has already

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[5] 7 WORKS OF JEREMY BENTHAM 171 (Browring ed. 1843), as quoted in Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281, 284 n.6 (1956). Professor Currie cites other reasons to criticize the requirement and concludes by saying: "I trust it is abundantly clear that in this Article I have come, like the California Supreme Court, to bury the requirement [of mutuality], not to praise it."

[6] RESTATEMENT, JUDGMENTS § 96(1)a, comment at 473-74 (1942).

[7] 36 Del. 124, 172 Atl. 260 (1934).

[8] *Id.* 172 Atl. at 262.

[9] 38 Miss. 476 (1860).

pointed out the flaws with the "fair play" concept. Taking this analysis one step further, the question must be asked, "Why is it unfair to hold a litigant accountable for or bound by the earlier case?" If a person is in court, has a chance to produce witnesses and evidence, and may cross-examine, why is it unfair to permit the former litigant to take a position inconsistent with facts *already judicially determined?*[10] Probably the whole issue of fairness is just another way of expressing the due process of law argument.

In the due process of law argument the emphasis is on the right of a person to be heard, to have his day in court by presenting witnesses, etc. The Mississippi court expressed it thus, over one hundred years ago:

> Lord Coke said, that to judge a man in a civil or criminal case, without affording him an opportunity to be heard, would be against Magna Charta.
>
> And it has been repeatedly held in this country, under the terms "law of the land," "due course of law," "due process of law," embodied in our respective State and Federal Constitution, is meant, that every citizen shall hold all his civil and political rights under the protection of a general law, which hears before it condemns; which proceeds upon notice and inquiry, and renders judgment against him, only after a fair and impartial trial.[11]

It is evident from this discussion of due process and from an analysis of fair play that neither applies to a person who was a party to the former action. It would, however, be unfair and violative of due process to bind by a former judgment a person who had not been a party to the earlier action. The new party would not have had the opportunity to produce witnesses, etc. If such a party were bound by an earlier judgment, the party would have a judgment against him without having been afforded an opportunity to be heard, and the result would amount to neither fair play nor due process.

Thus, there is every reason to prohibit the use of a judgment against one not a party to the earlier action; but will the same logic hold up when the person against whom the plea is used was a party to the original action? Jeremy Bentham is not the only writer to point out the fact that neither the fair play argument nor the due process argument is valid as against one who was a party to the earlier action. Perhaps the most succinct statement of why mutuality is not needed can be found in the case of *Bruszewski v. United States.*[12] Appellant

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[10]Numerous text writers have asked these same questions and arrived at the same answer: abolish mutuality. See, *e.g.*, Note, 41 VA. L. REV. 404, 418 (1955).

[11]Lipscomb v. Postell, 38 Miss. 476, 490 (1860).

[12]181 F.2d 419 (3d Cir. 1950).

in that case had brought action against his employer for personal injuries and had lost. He then brought the second action against the United States, since his employer was working under contract with the United States. The United States, although not a party to the former action, pleaded the former judgment in bar of the relitigating of the same issues, and the district court sustained the plea. Appellant appealed contending that since he could not have relied upon a judgment in the first case had the judgment been in his favor, he should not be bound by the judgment against him. This is, in essence, the fair play argument. In rejecting this argument the court said: "In reality the argument of appellant is merely that the application of *res judicata* in this case makes the law asymetrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata*."[13]

One of the cases that gives a most extensive analysis of the due process argument for mutuality is *Coca-Cola Co. v. Pepsi-Cola Co.*[14] The point is made that it would be violative of due process for one who was a party in an earlier action to rely upon the earlier judgment against one who had not been a party, because the latter would not have had the opportunity to present his case. The court goes on to point out that this reasoning is not valid if the party against whom collateral estoppel is pleaded was a party to the earlier case because that party would have had the opportunity to present his case in court.

The leading case in this area and the one that has been said to have rammed "the widest breach in the citadel of mutuality"[15] is *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n.*[16] In abrogating the requirement of mutuality the California court said:

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. . . . He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.
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> No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it

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[13] *Id.* at 421.

[14] 36 Del. 124, 172 Atl. 260 (1934).

[15] Zdanok v. Glidden Co., 327 F.2d 944, 954 (2d Cir. 1964).

[16] 19 Cal. 2d 807, 122 P.2d 892 (1942).

as res judicata against a party who was bound by it is difficult to comprehend.[17]

A steadily increasing number of jurisdictions have followed the lead of the *Coca-Cola* case and the *Bernhard* case in abolishing the requirement for mutuality.[18]

II. If Not Mutuality, Then What?

It is interesting to note that in all the cases where time has been taken to analyze the need for mutuality, the courts have concluded that mutuality is not necessary. In so doing, however, the concept has not been erased without substituting something therefor. It is apparent from the cases quoted above that the correct approach in determining whether or not a plea of collateral estoppel is well taken is to look at the status of the party entering the plea and the manner in which the plea is being used.

A. Status of Party

Even those cases condemning mutuality acknowledge that the plea of collateral estoppel should not be permitted from one who had been a party to an earlier action as against one who had not been a party and had had no opportunity to present his case in court. The basic condition with which this entire article deals, then, is when a litigant, not a party to the original action, invokes the plea of collateral estoppel against a litigant who had been a party to the former action.

Each time a court changes or abolishes a rule of law it must come to grips with the problem of what impact the newly created rule will have and whether it should be modified or limited in any manner, and the change from mutuality to status of parties is no exception. The general rule would be stated as follows: A litigant may enter a plea of collateral estoppel against a second litigant to prevent the second litigant from relitigating issues already adjudicated by final judgment in an action wherein the second litigant was a party, even if the

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[17]*Id.* 122 P.2d at 894-95.

[18]See Graves v. Associated Transp., Inc., 344 F.2d 894 (4th Cir. 1965); Haddad v. Border Express, Inc., 300 F.2d 885 (1st Cir. 1962); Davis v. McKinnon & Mooney, 266 F.2d 870 (6th Cir. 1959); Colorado v. Ohio Casualty Ins. Co., 232 F.2d 474 (10th Cir. 1956); Gibson v. United States, 211 F.2d 425 (3d Cir. 1954); Adriaanse v. United States, 184 F.2d 968 (2d Cir. 1950); Hurley v. Southern Calif. Edison Co., 183 F.2d 125 (9th Cir. 1950); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962); Gorski v. Commercial Ins. Co., 206 F. Supp. 11 (E.D. Wis. 1962); Taylor v. Sartorious, 130 Mo. App. 23, 108 S.W. 1089 (1908); Edwards v. Jones, 49 Nev. 342, 246 Pac. 688 (1926); Bernard v. Metropolis Land Co., 40 Nev. 89, 160 Pac. 811 (1916); Good Health Dairy v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937); McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W.2d 194 (1956).

litigant entering the plea of collateral estoppel had not been a party to the former action or in privity with a former party.

Taken to its logical conclusion, this rule would be simple to apply; some examples should be considered to illustrate its use. Example (1): *X* sues *Y* for damages to *X*'s car allegedly caused by *Y*'s negligence, and there is a judgment for *X*. *Y* then sues *Z*, the driver of *X*'s car, for damage from personal injuries received in the collision. Assuming the issue were the same,[19] *Z* could plead collateral estoppel and could bar *Y* from relitigating the same issues.[20] Example (2): If *A* were to sue *B* and a judgment were entered in favor of *B*, *C* could rely upon that judgment in a plea of collateral estoppel in a subsequent action by *A* against *C*.[21]

It should be noted that in Example (1) the party against whom the plea was used had been a *defendant* in the earlier action, while in Example (2) the party against whom the plea was used had been a *plaintiff* in the earlier action. There has been some discussion as to whether it matters if the party against whom the plea is used was a plaintiff or a defendant in the earlier action. Among those supporting the abrogation of mutuality there is apparent unanimity that the plea should be used against a former plaintiff who is seeking, again as plaintiff, to relitigate. This position gains support from the fact that there is language in both the *Coca-Cola* case[22] and the *Bernhard* case[23]

[19]The question of whether or not the issue is the same is out of the scope of this article, and presents some interesting problems. One such problem should be mentioned, because it is indicative of how this plea of collateral estoppel can be used to preclude relitigating one issue and still permit other, new issues to be decided. In Example (1) given in the text, assume further that *Y* does not plead contributory negligence. In a state such as Mississippi that has a comparative negligence statute instead of allowing contributory negligence to be a complete bar, the question may arise in the second action of *Y* against *Z* as to whether or not the issue of *Z*'s contributory negligence, if any, was in issue in the earlier action. This question would not have to defeat *Z*'s plea of collateral estoppel, because the first action would definitely have litigated the question of *Y*'s negligence. Thus, the proper disposition of *Z*'s plea would be to sustain it as to the question of *Y*'s negligence and permit the case to be tried to determine *Z*'s negligence, if any, and the effect of *Y*'s already adjudicated negligence. This disposition would be proper, it must be repeated, *only* if there were a question unanswered in the earlier case of whether or not *Z* had been contributorily negligent.

[20]See Lustik v. Rankila, 131 N.W.2d 741 (Minn. 1964); Bishop v. Downs, 18 App. Div. 2d 1127, 239 N.Y.S.2d 529 (1963).

[21]See Bruszewski v. United States, 181 F.2d 419 (3d Cir. 1950).

[22]See 36 Del. 124, 132-33, 172 Atl. 260, 263 (1934), where the court spoke of "the unsuccessful plaintiff in the former proceeding" and of "a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs."

[23]See 19 Cal. 2d 807, 318, 122 P.2d 892, 895 (1942), where the court stated: "It would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries." See also Bruszewski v. United States, 181 F.2d 419 (3d Cir. 1950).

referring to plaintiffs; but the cases using language relative to plaintiffs are cases in which the plea is against a former plaintiff acting as plaintiff in the second action, so the language cannot be said specifically to exclude a former defendant acting as plaintiff in the second case.

A minority of text writers and cases have attempted to prevent the use of the plea against a defendant-turned-plaintiff based upon the theory that there are advantages to being a plaintiff that do not accrue to a defendant.[24] The contention is generally made that the defendant is at a disadvantage because he did not select the forum or the time. There is also the nebulous allegation that being a defendant restrains and restricts and does not permit one fully to litigate his side of the case. Some courts have held that the defendant has not, in the fullest sense, had his day in court and therefore should not be bound. The fallaciousness of these contentions as a general rule should be readily apparent when one recalls the criminal phase of our jurisprudence. If we were seriously to contend that a defendant, by virtue of being a defendant, did not have the same protections and advantages as a plaintiff (or prosecutor) then our entire criminal law would be a sham and a farce. If a defendant, as a defendant, cannot have his day in court, then the doors should be opened to all the prison cells or we should stop telling the public that "the burden is on the state," "all men are presumed innocent," etc. Certainly one must acknowledge that prior to modern pleading a plaintiff might have gained an advantage; but now with forum non conveniens, change of venue, expanded subpoena power of courts for witnesses, and a multitude of other procedural innovations designed to put both parties on equal footing at the outset, there is little basis, if any, to contend that a defendant is prejudiced automatically by virtue of his being a defendant. There is even less basis to contend that a defendant is automatically prevented from presenting anything but the fullest possible case. If a defendant elects to put on anything less than a complete case, he should not be permitted to benefit from such action by being allowed to relitigate the issues he willfully failed to litigate initially.

The point to be made here is that there is no compelling reason for preventing the plea of collateral estoppel to be made against a former defendant currently seeking to relitigate as a plaintiff. The same public policy demands an end to litigation and the same rule obtains that one who has had an opportunity to litigate fully is bound by the judgment. There may be some peculiar procedural situation created in the future or some unusual fact situation resulting in an isolated case where a defendant in an earlier action might not have

[24]See, *e.g.*, Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 303, 316 (1956).

had an opportunity to litigate fully. This occurrence can be solved by adhering to the general rule stated above in all cases but permitting any defendant-turned-plaintiff to show affirmatively that he did not have an opportunity to litigate fully. It would be absurd to limit the vitality of the general rule merely on the off-chance that something *might* happen *sometime*—especially when it can be effectively handled by permitting affirmative proof to be offered.[25]

The question of whether or not a defendant-turned-plaintiff should have the plea of collateral estoppel used against him has been referred to, on occasion, as the offensive-defensive distinction on the theory that the plea should be available against anyone who had the "offense" in the prior action but not against anyone who was on the defense. The discussion above should indicate the reasons why this distinction, *when used in this context,* is not valid. It matters not whether the party had been a plaintiff or a defendant in the earlier action, it only matters whether or not the party to the former litigation had a fair and untrammelled opportunity[26] to present his case. There is, however, a valid and an important context for the offensive-defensive use of the plea that must be analyzed, because it may well require the imposition of a limitation on our thus-far unlimited general rule.

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[25]Professor Brainerd Currie approaches this problem from the standpoint of initiative and concludes that a defendant may well have the initiative or at least the opportunity to litigate fully. He declines to go as far as is suggested above, however, because he doubts the inclination of courts to investigate on a case-by-case basis. In Graves v. Associated Transp., Inc., 344 F.2d 894, 900 (4th Cir. 1965) this point is reviewed and the following statement is made: "The courts have not justified this pessimistic view of their duty and function; instead they have willingly inquired into the circumstances of the actual case. . . . [citing cases]." It is submitted that this entire problem can be avoided with the procedure suggested above, by placing the burden on the party to show no chance to litigate fully rather than upon the court to inquire, on its motion, in every case. If a party can avoid falling victim to collateral estoppel by showing a prior inability to litigate fully, the courts can be assured that the litigant will bring the subject to the court's attention. The courts can be just as certain that if a party does not raise the issue, it is not apropos.

[26]In the past, courts have used as a reason for not allowing a plea of collateral estoppel the excuse that it might not have been convenient or tactically wise for the defendant to defend fully or that the former case might not have been "big enough" to warrant a full-fledged defense. To adhere to this rationale is to permit the defendant to trifle with the court and waste the court's time just as surely as a plaintiff wastes the court's time when he attempts to relitigate against successive defendants. While no defendant should be compelled to litigate fully, each defendant should realize that if the opportunity to litigate is his, then he will be held to the same accountability in future actions as a plaintiff who elects not to litigate fully. Thus, *opportunity* to litigate fully, and not whether, in fact, there was full litigation, must be the criteria.

B. Use of Plea

In the foregoing Examples (1) and (2) although the plea was utilized once against a defendant-turned-plaintiff and once against a plaintiff who had also been a plaintiff in the former action, the plea in both examples was utilized by a defendant in the second action against a plaintiff in the second action. The plea in both examples was used to defend against relitigation of an issue. The plea was an integral part of the defense against plaintiff's cause of action. This was, in the truest sense, a defensive use of the plea.

Continuing with examples of the effect of the general rule if taken to its logical conclusion, the potential offensive use of the plea can be considered. Example (3): *X* sues *Y* for damages to *X*'s car allegedly caused by *Y*'s negligence, and there is a judgment for *Y*. *Z*, a passenger in *X*'s car, sues *X* for personal injuries received in the collision with *Y*'s car. Assuming the issues are the same,[27] *X* would be collaterally estopped from denying negligence. Example (4): *B*, a passenger in *A*'s car, sues *A* and recovers for personal injuries suffered in a one car accident when *A* negligently drove the car into a tree. *C*, the only other party involved, then brings suit against *A*. *A* would be collaterally estopped from denying negligence.

Each of these examples indicates an offensive or affirmative use of the plea; that is, they both present situations in which the party making the plea is utilizing the plea as a part of or as the entire foundation for the cause of action of the party. In each example there might well be only a trial on the issue of damages with the issue of negligence being disposed of by the plea. The two examples are designed to illustrate that it would not matter whether the party against whom the plea was being used had been a defendant or a plaintiff in the earlier action. These illustrations are in line with the conclusion stated above that the prior status of the party is irrelevant so long as the party had a full and complete opportunity to present his case in the earlier action.

The logic as well as the practical considerations that required the abolition of mutuality in the defensive context still obtains. In the offensive examples the party against whom the plea was used had had

[27]This is a dangerous example because there are numerous possibilities where the issue as between two drivers might be different from the issue between a driver and a passenger. The differences would more than likely be more between the standard of care owed by the driver than in the fact in issue. In the interest of simplicity of example to illustrate a point about collateral estoppel the reader is respectfully requested to control his imagination with regard to possible additional factors that would obviously make such a plea inapplicable regardless of which rule of collateral estoppel is used, and content himself with the basic assumption that the issue to be litigated is the same.

ample opportunity to litigate in the earlier action; no due process had been violated, and nothing advanced thus far in this article would indicate a need for limiting the general rule to preclude its application in an offensive manner.

There is another facet of the offensive use of this plea that must be examined carefully before a decision can be made as to the advisability of permitting the offensive or affirmative use of the plea. It is the situation where there may be a large number of plaintiffs in a group that might bring a series of individual actions. Probably the most thorough examination of this problem has been made by Professor Brainerd Currie.[28] He refers to this situation as the "multiple-claimant anomaly" and contends that the *Bernhard* case should not be extended to a multiple-claimant situation because the following situation might occur: assume a train wreck with fifty passengers injured and fifty separate actions against the railroad. If the railroad company wins the first case, it cannot benefit from the judgment in the forty-nine subsequent cases; but if the railroad loses the first case, then the subsequent plaintiffs could rely upon that judgment and have merely forty-nine trials to determine damages. There is nothing illogical about this situation, because it is in line with the basic considerations of collateral estoppel. The only difference between it and Example (4) is that there are forty-eight passengers in addition to *B* and *C*. The forty-nine subsequent plaintiffs cannot have their cause of action taken from them merely because the railroad wins against the first plaintiff because they have not had their personal, individual days in court. By the same token, the railroad is not unduly harmed nor is its due process violated if it loses to the first plaintiff, because it has had its day in court.[29]

Professor Currie makes it abundantly clear that he opposes mutuality and agrees that it should not be countenanced, and the railroad example just given presents no anomaly. The problem arises when the railroad wins the first twenty-five cases and then loses case number twenty-six. This means that the remaining twenty-four plaintiffs could rely upon

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[28]Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281 (1956).

[29]In the case of United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962) a similar situation was actually before the court. A plane crash between a U.S. fighter plane and a commercial plane killed forty-two passengers resulting in suits all over the United States against the air line and the United States. Twenty-four of the actions were consolidated in the Ninth Circuit area and a verdict was entered. Plaintiffs in the instant case then brought their action to trial and contended that the defendants were collaterally estopped by the earlier judgment from denying negligence. The court in its opinion examined thoroughly the need for mutuality, concluded that it is not necessary, and sustained the collateral estoppel contention. This had the additional benefit of reducing litigation, but different procedural rules could have achieved the same result.

the judgment in case number twenty-six and have only a trial for damages with the total score for the railroad being: won twenty-five, lost twenty-five.

The situation pictured by Professor Currie certainly does not reach the result courts seek, and the frustration of the railroad is easy to imagine after winning twenty-five cases and then not having an opportunity to use those twenty-five verdicts in the cases remaining after case number twenty-six; but is this really an anomaly? Or, more to the point, is this any more an anomaly than not permitting plaintiffs *27-50* to rely upon judgment number twenty-six and still having several more verdicts for plaintiffs? Probably not. The frustrating thing about Professor Currie's hypothetical is not that it is anomalous,[30] but that it is not consistent—not symmetrical.[31]

One naturally rebels at the thought of a series of judgments based upon the same facts reaching different conclusions; but does the solution suggested by Professor Currie, that of not allowing an offensive use of the plea in multiple plaintiff situations, solve the problem? Probably not. There is always the chance that a second or twenty-sixth jury will see the facts differently and there is just as great a chance that others will as well. By requiring planitiffs *27-50* to litigate (or relitigate, from the railroad's point of view) the issue of negligence as well as damages, the courts will not have eliminated the possibility of more plaintiff's verdicts. The courts will merely have guaranteed that there will not be, automatically, twenty-five plaintiff's verdicts. It is apparent, then, that Professor Currie's solution does not solve the problem; it merely diminishes the potential adverse effect. The extent of the diminution depends upon how late in the series of cases the anticipated aberrational verdict comes, so even that supposed benefit is speculative.

It would appear, then, that the problem of the multiple-claimant situation will not be solved by either approach within the framework

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[30]The really anomalous situation has already been taken care of as an exception to mutuality even in those jurisdictions still relying upon mutuality. The situation occurs most often in the indemnitor-indemnitee relationship. RESTATEMENT, JUDGMENTS § 96, comment *a* (1942), puts it thusly:

> If a judgment against the claimant [in action against an indemnitor] were not res judicata in a subsequent action against the indemnitee, either the indemnitee would be required to pay without possibility of indemnity against the indemnitor, or the indemnitor would be required to make indemnity for a claim which, in an action by the claimant against him, had been found not to exist.

It should be noted, however, that an indemnitee or indemnitor is not permitted to use the plea offensively. There is nothing comparable in the railroad hypothetical.

[31]Symmetry and consistency are not the goals of the courts. See Bruszewski v. United States, *supra* note 21, at 421.

of res judicata and collateral estoppel. The solution probably lies in the passing of new procedural statutes making easier the joinder of multiple claimants in one action and otherwise encouraging consolidation of cases. The benefits would include less inconsistency in judgments and, much more important, a reduction of litigation; but such legislation is outside the scope of this article. Thus, due to the general status of procedural rules throughout this country, courts are presented with the fact that without an offensive use of the plea, conflicting or contradictory judgments will arise from the normal condition that men who compose juries can take the same set of facts and reach different conclusions; and that with an offensive use of the plea, conflicting or contradictory judgments will also arise from juries and from operation of law. The question then arises whether there is any other reason than the so-called multiple-claimant anomaly for limiting or prohibiting an offensive use of the plea. The answer is in the affirmative.

The basic public policy consideration of res judicata is the termination of litigation once begun, insuring finality of judgments. This policy has the additional result of reducing the total amount of litigation, a much-needed effect in these days of crowded dockets. In October of 1965 the United States Supreme Court opened a new term with over 1,300 cases before it on appeal and countless hundreds of nascent appeals. Trial courts, both state and federal, are crowded, and parties to litigation become restless as it takes long periods of time to get matters to trial. As society grows and as people live closer and closer together in an increasingly complex world, litigation will also increase. Under such circumstances, our judicial system cannot permit multiplicity of actions and relitigation of issues already decided if there is any procedure or doctrine extant that will fairly and equitably dispose of the "extra" or "duplicate" actions growing out of one fact situation or presenting the same issue to be litigated.

An offensive use of the plea of collateral estoppel would probably encourage litigation, especially in cases turning on a fact question alone. Persons who normally would not sue might be encouraged to do so if they could rely upon an earlier case already decided in a way beneficial to their own; and those who would sue anyway might bring a small action where the consequences of losing are equally small merely to use the judgment if the judgment turns out to be favorable. Such a situation gives plaintiffs an advantage over defendants, a condition that cannot be tolerated. This same point was made in *Nevarov v. Caldwell*,[32] where the California court refused to permit a new plaintiff to use a judgment offensively against a defendant who had been a party to an earlier action. The court said:

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[32]161 Cal. App. 2d 762, 327 P.2d 111 (1958).

> This action is part of a larger pattern which has developed in personal injury cases in Los Angeles County and probably elsewhere in the state. The attorney who has a difficult case or group of cases on his hands files in the municipal courts an action for recovery from a single defendant for property damage or minor personal injuries in the expectation that liability will be easily and speedily established and the question of damages left as the only issue to be decided in the principal action or actions brought in the superior court because res judicata establishes defendant's liability. . . .[33]
>
> It becomes necessary in this case to declare the public policy of this state upon the application of the rule of res judicata to multiple claims of different persons for personal injuries or property damage against a single defendant or set of defendants growing out of a single accident. We hold that res judicata does not apply to those situations; that such an extension of the doctrine would be promotive of litigation and in subversion of sound principles of judicial administration looking to equal justice for all.[34]

An assessment of the offensive or affirmative use of the plea reveals that there are several disadvantages and potentially inequitable situations that might occur from its use, while such is not the case with the defensive use of the plea. Most, if not all, of the disadvantages occur in the multiple-claimant situation; but unless there are multiple-claimants, even if only two, the situation will not arise for the use of the plea in an offensive or affirmative manner. For that reason it would appear to be better to refrain entirely from permitting the offensive or affirmative use of the plea rather than attempting to permit such a use except in the multiple-claimant situation.

C. Statement of Rule

The rule with regard to collateral estoppel should permit the use of the plea by one not a party to the earlier action *against* a party to the earlier action in situations when the party utilizing the plea is a defendant in the present action, or a plaintiff using the plea to defend against an affirmative defense or counterclaim, or in any other capacity wherein the use of the plea is defensive in nature and does not form the basis for a cause of action or part of a cause of action. This restriction on the use of the plea is not predicated upon any concept of mutuality whatsoever. The mutuality concept should be erased entirely from collateral estoppel. The fact remains, however, that as shown above, there are valid reasons for prohibiting an offensive use based upon several factors *other than* mutuality. The fact that mutuality also

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[33] *Id.* 327 P.2d at 115.

[34] *Id.* 327 P.2d at 119.

reached this result is no reason to retain some half-allegiance to it, especially since the benefit from mutuality may be preserved even when mutuality has been abolished and its ill effects can be destroyed along with mutuality. No offensive or affirmative use of the plea of collateral estoppel should be permitted.[35] If the party against whom the plea is used did not have a full opportunity to present his case, the burden should be upon him to raise that issue and prove the lack of an opportunity to litigate fully. If the party against whom the plea is used fails to raise the issue, it should be presumed that there was ample opportunity to litigate in the earlier action, and the court should sustain the plea based upon this presumption. The foregoing elaboration of the ideal rule for the plea of collateral estoppel is predicated upon the assumption that the issue as to which the plea is entered is the same as one previously litigated.[36]

III. The Law in Mississippi

The doctrine of collateral estoppel has grown in Mississippi in much the same manner and for most of the same reasons discussed in a general way earlier. Res judicata is firmly entrenched in Mississippi jurisprudence and has been for a long while. The four identities necessary for res judicata have been relatively unchanged throughout. Periodically they are summarized, as they were in the case of *Palmer v. Clarksdale Hosp.*[37] cited at the outset.

The development of collateral estoppel has been somewhat obscured until recently because the earlier cases continued to speak in terms of res judicata instead of making the distinction and referring to collateral estoppel. Thus, in the case of *Von Zondt v. Town of Braxton,*[38] the court said:

> In a second action between the same parties, *or their privies,* although the causes of action may be different, the judgment

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[35]It is always dangerous to make unequivocal statements in pleading the case for the adoption of a new theory in a jurisdiction, because there are always exceptions. One such exception to the statement just made is the case of Zdanok v. Clidden Co., 327 F.2d 944, 956 (2d Cir. 1964), where the court discussed Professor Currie's multiple-claimant anomaly, acknowledged that there are multiple claimants in the case before it, and then elected to allow the offensive use of the plea anyway "where the matter in issue is not a factual question of negligence subject to the varying appraisals of the facts by different juries, but the construction of a written contract by a judge." Some courts may prefer to allow the plea to be used offensively if the issue sought to be relitigated is a question of law rather than of fact; but since judges are fallible human beings and sometimes differ as to what the law is, this might not be a good idea.

[36]See note 19 *supra.*

[37]213 Miss. 611, 57 So. 2d 476 (1952).

[38]149 Miss. 461, 115 So. 557 (1928).

> in the first action is res judicata in the second as to any point or question actually litigated and determined in the first.[39]

This case and others[40] state the classic collateral estoppel rule, but do so by calling it res judicata. At other times the court has spoken in terms of "conclusiveness" of the prior judgment upon parties and their privies.[41]

Regardless of what the earlier cases called it, collateral estoppel was recognized in Mississippi, and the elements have been long established to be:

(1) Attempt to relitigate the same issue, and
(2) Parties in second action must be either the same parties as in first action *or their privies.*

These same elements were acknowledged in the case of *Etheridge v. Webb;*[42] and it was in this case that the court, apparently for the first time, referred to the doctrine as something other than res judicata. The court called it "collateral estoppel by judgment;" and since that time not only the concept, but also the term collateral estoppel has been an important part of Mississippi law.[43]

As was pointed out earlier, collateral estoppel differs from res judicata not only in elements but also in effect. Mississippi acknowledged in the case of *Lyle Cashion Co. v. McKendrick*[44] the fact that with res judicata there is a complete merger of all issues whether actually litigated or not and with collateral estoppel there is only a bar against relitigating the issue or issues actually litigated. This distinction was emphasized in the case of *C.I.T. Corp. v. Turner*[45] where the court acknowledged the distinction and then pointed out that since all the cases and authorities relied upon by the appellee dealt with res judicata, none of the authorities cited were applicable nor did they control the disposition of the case. Since most of the early cases make the distinction between res judicata and collateral estoppel but use the term res judicata to apply to both, care must be taken to know which concept the court is using and one may not always depend upon the category or term the court applies.

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[39]*Id.* at 465, 115 So. at 559. (Emphasis added.)

[40]Duett v. Pine Mfg. Co., 209 Miss. 830, 48 So. 2d 490 (1950); Watkins v. Mississippi State Bd. of Pharmacy, 170 Miss. 26, 154 So. 277 (1934); Cotton v. Walker, 164 Miss. 208, 144 So. 45 (1932); Darrow v. Moore, 163 Miss. 705, 142 So. 447 (1932).

[41]Townsend v. Beavers, 185 Miss. 312, 188 So. 1 (1939); Fair v. Dikerson, 164 Miss. 432, 144 So. 238 (1932).

[42]210 Miss. 729, 50 So. 2d 603 (1951).

[43]See Garraway v. Retail Credit Co., 244 Miss. 376, 141 So. 2d 727 (1962).

[44]227 Miss. 894, 87 So. 2d 289 (1956).

[45]248 Miss. 517, 157 So. 2d 648 (1963).

Mississippi follows the basic collateral estoppel rule as set forth above, and makes it applicable to parties and privies alike. In the recent case of *Johnson v. Bagby*,[46] however, language was used as dicta that, without a careful analysis, might lead one to conclude that in Mississippi the plea is not available to privies. In the *Johnson* case a plea of collateral estoppel was raised by a party not a litigant in the original action against a party who was one of the original litigants. The court *implied in dicta* that collateral estoppel was not available as between privies but only as between the parties themselves;[47] but a close reading of the opinion reveals that the court does acknowledge that the plea is available to privies as well as parties. The court was merely attempting to preclude use of the plea by one neither a party nor privy in the original action under the facts of that case. All of the Mississippi cases relied upon by the court in the *Johnson* case follow the general rule that privies may use the plea as well as parties.[48] The basis for the decision in the *Johnson* case was that the issues litigated originally were not the same issues sought to be litigated in the second action.[49] This is, of course, the first consideration. If the issues are not the same, the plea is not available even to the parties, much less to privies. The conclusion must be reached, then, that the doctrine of collateral estoppel in Mississippi is available both to parties and to their privies alike as has always been the case.[50]

Mississippi courts recognized, as did other courts, that certain fact situations might occur that would dictate the use of collateral estoppel although the litigant attempting to use the plea was neither an original party nor in privity with an original party. The circumstances that gave rise to this problem are few, but they fit into the classic exception mentioned much earlier, derivative liability. It was first recognized in

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[46]171 So. 2d 327 (Miss. 1965).

[47]*Id.* at 330, where the court states: "[W]e still hold that it is necessary that the parties to the subsequent action must be the same as those in the prior action." Of course, the implication comes only from the fact that privies are not mentioned; and since there is no specific repudiation of the long line of Mississippi cases that specifically mention and include privies in the general rule, one can only assume that the court did not intend to prevent privies from using the plea.

[48]In addition to all the Mississippi cases cited that include privies in the doctrine, see 50 C.J.S. *Judgments* §§ 686, 712a(1) (1947); 30A AM. JUR. *Judgments* § 371 (1958).

[49]At 171 So. 2d 327, 331 (Miss. 1965) the court stated: "Thus we are faced with *this ultimate question*: Was a fact essential to a judgment actually litigated which will preclude the appellant from maintaining the suit at bar? We hold that this essential fact was never litigated in the county court." (Emphasis added.)

[50]The privileges as well as the liabilities of parties to litigation were extended to their privies in Mississippi at least as early as 1843 in the case of Cartwright v. Carpenter, 8 Miss. (7 How.) 328 (1843), and, as shown above, this concept has continued in force ever since. See, *e.g.*, note 39 *supra* and accompanying text.

a modified form in *Cartwright v. Carpenter.*[51] Much later, in *Grandquist v. Crystal Springs Lumber Co.*[52] the relationships of principal-agent and master-servant were acknowledged to be in this category.

The Mississippi Supreme Court wisely foresaw the anomaly that would occur if the derivative liability exception to the party or privity requirement were not permitted. With reasoning that anticipated the *Restatement*[53] the court, in *Townsend v. Beavers,*[54] said:

> If they [plaintiffs who lost earlier case] were subsequently allowed so to do [relitigate the same issue they lost earlier] and should prevail in their contention in the subsequent litigation, there would be two wholly inconsistent decrees in the same estate between the same adversary parties, namely in one decree that the debt or debts in question were probated in the manner and within the time allowed by law and in the subsequent decree that the same debt or debts were not probated in the manner and within the time allowed by law.
>
> This would be an impossible situation in legal allowance, and manifestly so, as it seems to us.[55]

From the foregoing it should be evident that Mississippi, thus far, adheres only to the general collateral estoppel rule and the normal derivative liability exception. It is interesting to note that none of the cases developing collateral estoppel from res judicata speak in terms of mutuality. The cases recognize the need for change and limit the change, not so much because of mutuality but because the basic concept of res judicata is limited to parties or privies. It is almost as if the court in the early cases merely used the parties or privies requirement without asking whether or not it is necessary. In spite of this, the one or two cases that almost broach the subject indicate that the requirement of mutuality can be abolished in Mississippi and the rule discussed above substituted therefor without any break with the line of authorities.

The discussion of mutuality must inevitably go back to an analysis of why it is or is not necessary. As was brought out earlier, the Mississippi Supreme Court, as early as 1860, analyzed mutuality and concluded that due process of law required it.[56] In the *Lipscomb* case the party against whom a plea of res judicata was being used had not been a party to the original litigation as had the party using the plea. The court correctly refused to permit the plea because the party against whom the plea was being used had not had an opportunity to be heard

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[51]8 Miss. (7 How.) 328 (1843).

[52]190 Miss. 572, 1 So. 2d 216 (1941).

[53]See note 30 *supra.*

[54]185 Miss. 312, 188 So. 1 (1939).

[55]*Id.* at 322, 188 So. at 4.

[56]Lipscomb v. Postell, 38 Miss. 476 (1860).

in court. This very valid reasoning is the starting point for all the other cases in the many other jurisdictions that have had the wisdom and insight to abolish the mutuality requirement.

Since the *Lipscomb* case, the Mississippi courts have not had to take the next logical step and abolish mutuality because a proper case raising the issue in a manner that cannot be avoided has not been encountered. Recently two attempts have been made to give the supreme court the opportunity and privilege of joining the modern trend and of abolishing mutuality. In *Garraway v. Retail Credit Co.*[57] and in *Johnson v. Bagby*[58] the issue was put before the court. In both cases the court based its decision on other grounds and never discussed mutuality. This leaves Mississippi with the older rule with regard to collateral estoppel.

IV. Conclusion

The need for the abolition of the concept of mutuality in the doctrine of collateral estoppel is great not only because of the adverse effects mutuality is having upon our jurisprudence, but also because of the fact that there is no justification whatsoever based upon legal theory or logic for the requirement of mutuality. The adoption of a rule permitting the defensive use of the plea by any party against one who was a party to the original action and who had had an opportunity to litigate fully would add new life and new vitality to the body of law dealing with judgments. Litigation would be reduced and justice preserved. Mississippi is indeed fortunate that the cases in this jurisdiction have already taken the first step by utilizing the due process concept. Thus, when the question of the need for mutuality is placed squarely before the Mississippi Supreme Court, as it inevitably will be, the court can follow the better reasoned approach and abolish mutuality entirely in Mississippi without overruling a single Mississippi case, acting in complete reliance on a long line of Mississippi cases dating back to the 1840's.

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[57]244 Miss. 376, 141 So. 2d 727 (1962).

[58]171 So. 2d 327 (Miss. 1965).

State Bar Section

FOREWORD

The legal profession in the state of Mississippi has undertaken to regulate and guide the conduct of its members by the adoption of sets of rules, commonly referred to as canons of ethics. The lawyer in this state, as a member of the American Bar Association, is subject to the provisions of the Canons of Professional Ethics of that body. In addition, the Commissioners of the Mississippi State Bar adopted, on May 24, 1962, a body of regulations based on the ABA canons. Pursuant to the authority of the court under MISS. CODE ANN. § 8708 (1956), these rules were approved and adopted by the Mississippi Supreme Court on June 4, 1962, as the Rules of Professional Conduct of the Mississippi State Bar. Both the Rules of Professional Conduct of the Mississippi State Bar[1] and the Mississippi Inter-Professional Code for Physicians and Lawyers,[2] adopted by the Mississippi State Medical Association and the Bar, have previously been printed in the *Mississippi Law Journal.*

In furtherance of the policy of the *Journal* to assist in keeping the Bench and Bar of this state abreast of areas of importance, both in the law and in the conduct of the profession, two matters bearing on professional ethics which are not generally available are presented below. The first of these are the opinions of the Ethics Committee of the Mississippi State Bar, interpreting certain provisions of the Rules of Professional Conduct. These opinions were adopted and rendered by the Ethics Committee on November 20, 1962.

Also included below are the Rules of Judicial Ethics of the Mississippi State Bar, as promulgated by the Mississippi Supreme Court on October 10, 1963. Unlike the Rules of Professional Conduct and the Mississippi Inter-Professional Code, these rules have not been published in the *Journal* before this time.

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[1] 33 MISS. L.J. 461 (1962).
[2] 34 MISS. L.J. 436 (1963).

OPINIONS OF THE ETHICS COMMITTEE

Opinion No. 1

Rule 27: *Advertising*—A lawyer may not with propriety obtain any distinctive listing in a classified telephone directory which is different from the manner and method adopted therein for all other lawyers.

Advertising—The listing of a lawyer's name in distinctive type in a telephone or city directory is condemned, even where in the non-classified section.

It has been reported to the Committee that attorneys are having their names listed in "bold face" type in telephone directories, are having their names listed in the classified section of such directories under various headings and are adding a "second line" wherein a specialty is claimed. We have been requested to render an opinion on such practices. We quote with approval and adopt as our own from an opinion of the Committee on Professional Ethics and Grievances of the American Bar Association (No. 284, August, 1951) as follows:

> An analysis of the foregoing communication indicates that the questioned listings by lawyers in a classified telephone directory are five-fold in scope:
>
> 1. Using a 'display' advertisement;
> 2. Using bold face type;
> 3. Adding a 'second line' wherein a specialty is claimed;
> 4. Using varied listings;
> 5. Using a listing entirely separate from the general classified listing for other lawyers.
>
> Canon 27 of the Canons of Professional Ethics forbids advertising or solicitation, either directly or indirectly, by a lawyer. The central purpose of Canon 27 is to prevent a lawyer from indulging in unseemly efforts to gain undue publicity calculated to bring law practice. At the same time the listing of lawyers under some suitable general classification, such as 'Lawyers' or 'Attorneys at Law,' is not to be discouraged, even in a classified directory, because the public is entitled to information regarding the names and addresses of lawyers.
>
> Hence questions relating to the use of a classified directory must be resolved by balancing the public interest against the incidental publicity accorded the individual lawyer. Where the publicity accorded each lawyer is the same, there can be no undue advantage. However, where the lawyer seeks some distinctive method of self-classification which is different from the general informative listing of his fellow lawyers, it becomes improper advertising or solicitation and offends Canon 27.
>
> In Opinion 53 our Committee stated that it is a breach of

Canon 27 for a lawyer's name to appear in a classified telephone directory in a distinctive manner, such as bold face type, or under a number of varied headings. In Opinion 123 our Committee affirmed this expression.

The use of an outright 'display' is, of course, direct advertising. The use of bold face type in a classified listing composed solely of other lawyers indicates a studied purpose to single oneself for special notice over and above his fellow lawyers. Also, adding to the regular classified listing a 'second line' in which a lawyer claims that he is engaged in a 'specialty' is an undue attempt to make his name distinctive. Obtaining varied listings demonstrates a desire to press for public attention in an attempt to become unduly distinctive. Selecting a listing different from the listing under which the rest of the lawyers appear is a clear attempt to segregate himself for special attention.

In all of these five situations we believe the lawyer would subject himself to the charge of gaining undue publicity for private advantage instead of merely permitting his name to appear along with his fellow lawyers under some general listing for public information.

Accordingly, it is our opinion upon this phase of the matter that a lawyer may not cause his name to be listed in the classified telephone directory under any of the five categories above specified.

During the past year the officers of several local bar associations have asked this Committee to reconsider its Opinion 241, in which we held, overruling our previous Opinion 223, that a lawyer might properly list his name in distinctive type in the alphabetical section of a telephone or city directory.

The basis for Opinion 241 was that this section of the telephone book or directory is not a law list in which anyone would look in order to select a lawyer, but is merely a means of locating a lawyer already determined upon, such listing making his location easier and therefore serving a useful purpose.

While this distinction would still appear to be pertinent, it is apparent from the action of a number of local associations and their members that the presence in such publications of certain lawyers' names in distinctive type is widely regarded as inconsistent with the object and spirit of Canon 27, as well as with professional dignity and good taste.

Accordingly, we have determined to overrule Opinion 241, and to reinstate Opinion 223.

Opinion No. 2

Rules 27 & 28: *Solicitations—Ambulance Chasers—Touters*—It is unethical and professionally improper for an attorney to use touters of any kind for the purpose of obtaining professional employment.

Solicitation—Ambulance Chasers—Touters—It is disreputable for a lawyer to employ runners to bring or influence the bringing of cases to him.
Lawyer's Duty—It is the duty of all attorneys-at-law, with knowledge of the employment of touters, agents or runners by an attorney-at-law, to inform the proper authorities so that any such practice will be stopped and the employing attorneys-at-law disbarred.

It has been reported to the Committee that certain attorneys are using agents or runners to obtain employment in personal injury cases and are paying such agents or runners, directly or indirectly. We have been requested to render an opinion concerning such practices. We quote with approval and adopt as our own the opinion of July 17, 1935, (No. 147) of the Committee on Professional Ethics and Grievances of the American Bar Association, as follows:

> It is equally unprofessional to procure business by indirection through touters of any kind. Canon 27.
> It is disreputable . . . to use agents or runners . . . or to pay or reward, directly or indirectly, those who bring or influence the bringing of cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender be disbarred. Canon 28.
> We are of the opinion that such conduct and practice is unethical and professionally highly improper, and should not be tolerated by any court to whose attention the facts are shown, nor by any association of lawyers who adopt or abide by the canons of professional ethics of the American Bar Association or other similar canons or rules of conduct.

Opinion No. 3

Rule 12: *Minimum Fees.* The habitual charging of fees less than those established by a minimum fee schedule, or the charging of such fees without proper justification, may be evidence of unethical conduct.

It has been reported to us that certain lawyers are habitually charging fees less than those prescribed in minimum fee schedule for uncontested divorce cases and personal injury cases; that others are guilty of a flagrant cutting of fees and that others do not conform to

the local minimum fee schedules. We have been requested to render an opinion thereon. We quote with approval and adopt as our own the opinion of the Committee on Professional Ethics and Grievances of the American Bar Association (No. 302, November 27, 1961) as follows:

> The establishment of suggested or recommended minimum fee schedules by bar associations is a thoroughly laudible activity. The evils of fee cutting ought to be apparent to all members of the Bar. Ordinarily fees should be arrived at by consideration of the factors enumerated in Canon 12, which among other things, admonishes lawyers not to overestimate or to undervalue their services. When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient. For example, no lawyer should be put in the position of bidding competitively for clients. It is proper for the profession to combat such evils by suggested or recommended minimum fee schedules and other practices which have a tendency to discourage the rendering of services for inadequate compensation. Such schedules represent the judgment of the local or state bar association as to what constitutes the minima for reasonable charges for legal services, and should be so regarded by the lawyers and the public in the community. Direct or indirect advertising by whatever means that a lawyer habitually charges less than reasonable or minimum fees would, of course, be objectionable.
>
> Canon 12 provides that in fixing his fees, 'it is proper for a lawyer to consider a schedule of minimum fees adopted by a bar association' not alone but along with other considerations; however, it also provides that 'no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of the fee.' While under the latter clause, this Committee has consistently held that minimum fee schedules can only be suggested or recommended and cannot be made obligatory (Opinion 28), it is equally true that the habitual charging of fees less than those established in suggested or recommended minimum fee schedules, or the charging of such fees without proper justification, may be evidence of unethical conduct, and the Committee accordingly so holds.

OPINION NO. 4

RULE 27: *Advertising*—It is advertising, and therefore unethical for a lawyer to cause or allow his professional card or a notice of any format to be published regularly or repeatedly in a newspaper or periodical having either general or special circulation.

The Committee has been informed that in certain towns and areas of this state, many and possibly all attorneys are either causing or

permitting professional cards to be published regularly in the local newspaper. The Committee has been asked to render its opinion with reference to this practice.

Canon 27 condemns solicitation of professional employment by direct or indirect advertising. So far as periodicals or other publications are concerned, this Canon condones only publication of limited categories of information concerning an attorney. It obviously does not permit repeated or regular professional cards or notices in any newspaper or publication regardless of size or area of circulation.

We do not herein decide upon the propriety of single or limited publication of special notices such as the opening of offices, change of address, partnership formation or the like; nor do we herein attempt to set limitations upon special notices circulated by mail. The Committee holds only that the regular and frequent publication of an attorney's card or notice in any newspaper or periodical offends and is in violation of the rules of professional conduct of the Mississippi State Bar.

Opinion No. 5

Rule 27: *Advertising*—A lawyer may not with propriety permit a corporation to show his name as General Counsel in published advertisements.

It has been reported to the Committee that certain corporations are showing in their published advertisements, the name of a lawyer engaged in private practice, as the General Counsel of the corporation. We have been requested to render an opinion on such practices. We requested an opinion from the Standing Committee on Professional Ethics of the American Bar Association and have received the following response thereto:

> This is in response for an opinion from our Committee on the second question raised in your letter of November 24.
>
> '2. Is it unethical for a lawyer to permit a banking institution or other corporation to list his name as General Counsel in newspaper advertisements?'
>
> It is the opinion of this Committee that it would be unethical unless the lawyer is a full time employee of the corporation.
>
> I enclose copy of our informal Opinion C-446 of July 13, which we think would be equally applicable to banking institutions or other corporations.

Informal Opinion C-446 referred to above, dated July 13, 1961, reads as follows:

> You have requested the Committee on Professional Ethics of the American Bar Association to advise you with respect to the following matter.

You state that you represent a nonprofit corporation of independent garage owners. It is their desire to place your name on their letterhead as General Counsel. You have represented this organization for many years and secured their corporate charter for them.

Under Canon 27 of the Canons of Professional Ethics, direct or indirect advertising or solicitation of professional employment is improper.

In opinion No. 285 issued September 4, 1951, the Committee on Professional Ethics held that it was improper under Canon 27 for a practicing lawyer to permit a manufacturers' association to specify his name as general counsel of the association on the association's letterhead. The opinion pointed out that although it was proper for a corporation in its annual report to stockholders to specify, along with the names of general officers of the corporation, that of its general counsel, it was not proper to specify such counsel's name on its letterhead, which would be directed, not to its stockholders, but to the general public. It also stated that in exceptional cases, where it is really important for the addressee to know who is counsel for the association, the addressee can be advised thereon in the body of the letter.

Of course, as Opinion No. 285 pointed out, no question of advertising is involved where Counsel is a full time employee of the corporation or association.

The Committee also ruled in Informal Opinion No. 79 that a law firm may not allow itself to be listed as counsel for a Community Chest. The Committee on Professional and Judicial ethics of the State Bar of Michigan held in Opinion No. 55 that it is not proper for a lawyer to permit his name to appear as counsel on the letterhead used by a certified public accountant. The same committee also held in Opinion No. 60 that a lawyer should not permit his name followed by the words 'of counsel' to appear on the letterhead of a collection agency.

This committee is accordingly of the opinion that it would be improper for you to permit the corporation referred to to place your name on its letterhead as General Counsel.

It is therefore the opinion of this Committee of the Mississippi State Bar that it would be unethical for a lawyer who is engaged in private practice to permit a banking institution or other corporation to include his name, as General Counsel of the corporation, in published advertisements of the corporation.

Opinion No. 6

Rule 27: *Advertising—Indirect*—It is the duty of an attorney to bring about the discontinuance of any advertising which newspapers might give him even though such advertising was rendered without his knowledge or consent.

The Committee has been informed of certain newspaper articles which name attorneys who represent well known clients and which mention attorneys in connection with publicized law suits. There has been a request for an opinion on these practices.

We quote from Opinion Number 62 of the Committee on Professional Ethics and Grievances of the American Bar Association as rendered March 19, 1932:

> A newspaper's repeated publication of a laudatory announcement regarding an attorney is indirect advertising, even when not done at his request or with his consent.

We further quote from Opinion Number 140 of the Committee on Professional Ethics and Grievances of the American Bar Association as rendered May 9, 1935:

> The most worthy and effective advertisement possible, even for a young lawyer, . . . is the establishment of a well merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. . . . Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged . . . defy the traditions and lower the tone of our high calling and are intolerable.

Opinion No. 7

Rule 23: *Attitude Toward Jury*—It is unprofessional and highly improper for a lawyer to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort.

This committee has been advised that there are lawyers who express to jurors solicitude for the personal comfort of the jurors and make flattering remarks to them such as "I appreciate your patience, attentiveness, etc.," or "you have been an excellent jury, etc."

Although the committee is aware of the fact that such statements and conduct is not uncommon in the Courts of this state, notwithstanding, it is the opinion of the committee that said statements or similar ones and such conduct are highly improper and unprofessional and are clearly in violation of Rule 23 of the Rules of Professional Conduct of the Mississippi State Bar.

Opinion No. 8

Rule 23: *Lawyer's Conduct Toward Jury*—A lawyer ethically has no right, after verdict, to seek out one or more members of a jury before whom he has tried a case and question them concerning how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case, and

> how certain members of the jury stood on certain questions, even assuming that the lawyer did so for the purpose of informing himself as to any mistakes he may have made in the presentation of evidence or of testing his judgment in selecting members of the panel.

It has been brought to the attention of the Committee that some lawyers, after the verdict in a jury case, interview a juryman as to what went on in the jury room and the salient points in arriving at their conclusions.

We quote with approval from Opinion 109 of the Committee on Professional Ethics of the American Bar Association, adopted March 10, 1934, as follows:

> The precise ethical question presented is whether or not it is professionally proper for a lawyer to interview, after verdict, jurymen who were on the panel as to what took place in the jury room and as to what the salient points were which caused the jury to arrive at a given verdict. The question assumes that the inquiries are directed by the lawyer for his own information and benefit. Before categorically answering the question, it would seem expedient, if not necessary, to cite a few of the numerous decisions in respect of the secrecy of the jury room and the immunity of jurors from interrogation as to their verdict. . . .
>
> It therefore may properly be concluded that the English cases, the case of the various state courts, and the decisions of the United States Supreme Court, do not permit to be introduced into evidence discussions in the jury room, as to the manner in which a jury arrived at any given verdict. This conclusion is supported, as above pointed out, by reasons of ancient usage and public policy.
>
> Canon 23, among other things, provides that 'A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.' Many times it has been pointed out in our opinions that a lawyer, like Caesar's wife, should be above suspicion.
>
> If, after verdict, a juryman wishes to talk upon interrogation by one of the lawyers who tried the case, one or more ethical questions present themselves. As far as the juror is concerned, is he to be subjected to embarrassment as to what reasons led him and the other jurymen on the panel to arrive at a given verdict? As far as the lawyer is concerned, he is prying into deliberations which, by reason of public policy, should be inviolate. Further, in questioning a juror about the motives prompting the jury's verdict, he is indirectly soliciting disclosures about the conduct of other members of the jury without their consent. As a practical matter, what security has the lawyer that he is obtaining a fair representation of what

took place in the jury room? If, as is likely to be the case, the juror, instead of relaying accurately the effect which the conduct of the lawyer produced, tempers it with charity, it may prove harmful instead of helpful. As far as the public is concerned may it not occur to them, especially where the attorney has pending other cases upon which the same panel of jurors may sit in judgment, that the lawyer is covertly attempting 'to curry favor with juries by fawning, flattery or pretended solicitude' contrary to the provisions of Canon 23.

This opinion, of course, is not intended to extend to a situation where there has been a mistake in the announcing or recording of a verdict, and in the protection of his client's interests, it may be necessary for a lawyer to interview members of the jury to prevent a miscarriage of justice. Nor does it extend to a case where a juror has been guilty of fraud. See Clark v. United States, 281 U.S. 1, 53 Sup. Ct. 465. Compare note in 47 *Harvard Law Review* 717 (1934) on United States v. Pleva, 66 F.2d 529 (2d Cir. 1933).

The committee is of the opinion that, upon the facts stated, the conduct of the lawyer is unethical. It tends to destroy the secrecy which should, on account of ancient usage and public policy, safeguard the activities in the jury room.

Opinion No. 9

Rule 27: *Advertising*—Publication in a local newspaper of Christmas or New Year's Greetings by a lawyer is improper under Rule 27, although without designation as a lawyer and although he holds public office and even though supported by local custom. *Advertising*—It is unethical for a lawyer to send Christmas greetings to clients as such.

It has been brought to the attention of the committee that some attorneys extend Christmas and/or New Year's Greetings to the public through a local newspaper. Various attorneys involved are public office holders. In some of the greetings there is no reference to the profession of the lawyer who is named. Also, the committee is informed that various attorneys send holiday greetings to clients through Christmas cards which depict a lawyer, a judge, scales of justice, etc.

We hold that these practices are highly improper and unethical and we quote with approval from Opinion 293 of the Standing Committee on Professional Ethics of the American Bar Association, adopted November 13, 1957, as follows:

> The chairman of the local ethics committee of a state bar association has asked our formal opinion as to whether it is contrary to the Canons for practicing lawyers to publish in a local newspaper the following advertisements:

1. Councilman and Mrs. John Jones extend sincere wishes to all for a Happy New Year.
2. Happy New Year to all, John Smith.

Both John Jones and John Smith hold public office.

We are advised that the publication of such greetings is not uncommon in the locality.

In the opinion of the Committee the publication of these advertisements is in each case contrary to both the letter and the spirit of Canon 27, the careful reading of which the Committee commends to the attention of all lawyers.

In Opinion 107 we disapproved the publication in the form of a joint Christmas greeting of an advertisement signed by twenty-two persons, including ten lawyers.

In Opinion 59 we condemned the distribution by a law firm in the form of a Christmas greeting of a 'year book' convenient as a diary or appointment book. In this Opinion the Committee said:

> The purchase and distribution of the 'year book' described in the question is obviously a form of advertising. Its purpose is to remind the client at the Christmas season of the fact that the donor is still practicing law and the clear expectation of the attorney is that, through the use of the book, the client will be so reminded day by day during the ensuing year. It is a subtle commercialization of the spirit of good-will which prevails at the holiday season, and its impropriety is not lessened because it bears the guise of that spirit. The distribution of such book, being a form of advertising, must be condemned as a violation of Canon 27.

In one of its earliest opinions the Committee held that a violation of Canon 27 was not justified by local custom: Opinion 4.

In the Committee's opinion the advertisements are not justified by the omission to state that the advertisers hold public office or that they are lawyers.

Lawyers continuing to practice as such cannot insulate themselves from the Canons by acting in other capacities.

We also quote with approval and adopt as the opinion of this committee the informal opinions referred to hereinafter by the Standing Committee on Professional Ethics of the American Bar Association as follows, to-wit:

> . . . In informal Opinion C-213, dated November 27, 1959, we had before us the question of whether it would be ethical for a lawyer or firm to send Christmas greetings to clients. The Committee referred to statement of Henry Drinker, in his book on Legal Ethics, page 247, where he said:

> Under Cannon 27 every indirect form of advertising, designed to sell professional employment is improper. Typical instances of such indirect advertising, condemned by the Committee, are . . . the sending out of Christmas books or greetings . . . .

In said Informal Opinion of November 27, 1959, this Committee said:

> It is the opinion of our Committee that it is unethical for a lawyer to send Christmas greetings to clients as such. This, of course, would not prevent an attorney from sending greetings to persons who happen to be clients (or employees or officers of clients) whom he knows socially or with whom he has had close personal contacts, just as he would do with friends who are not clients or associated with clients. Our Committee is further of the opinion that a lawyer's Christmas greeting cards or letters should make no reference to the sender's profession, and he should avoid cards which depict a lawyer, a judge, scales of justice, etc. In this connection we call attention to Opinion 107, in which the Committee held it was improper for a lawyer, designated as such, to join other persons in the insertion of Christmas greetings in a local newspaper.

Applying these rules, in an opinion dated March 14, 1961, we disapproved sending out of greeting cards by lawyers.

Opinion No. 10

Rule 27: *Solicitation—Advertising*—It is unethical and professionally improper for a lawyer to hold an "open house" at his law office.

The attention of the committee has been directed to the practice of some individual attorneys and law firms holding "open houses" at the opening or renovation of their offices and/or at Christmas, and/or on other special occasions. Invitations, either personally or in writing are given to other attorneys, clients and non-clients.

Rule 27 of the Rules of Professional Conduct of the Mississippi State Bar provides that it is unprofessional for a lawyer to solicit professional employment either directly or indirectly.

The intent of a lawyer in having an "open house" is obviously to advertise the office facilities of the host and the services that are available and in effect to solicit and encourage the guests to utilize his services.

In the opinion of the committee this constitutes a form of advertising and solicitation of business and is highly improper and unprofessional.

This ruling does not apply where all of the local lawyers only and no other persons are invited.

OPINION NO. 11

RULES 27, 35, & 36: *Advertising—Lay Intermediaries*—Improper for an attorney to permit the use of his name by lay intermediary which advertises to furnish legal services of any nature.

Advertising—Lay Intermediaries—Aiding the Unauthorized Practice of Law—where a lay intermediary advertises its services of a legal nature such as wills and trusts, it is unprofessional and improper for an attorney who may be the regular lawyer for the institution to permit the institution to regularly refer clients requiring the services of an attorney involving trusts and wills matters to him where obviously done largely because of the close relationship of the attorney and the lay intermediary.

The committee has been asked to express its opinion on two matters of a similar nature (1) may a lawyer who is a director of a bank or trust company allow his name to appear as a director in its advertisements which offer its services to the public in drawing wills and trust agreements and (2) whether it is proper for a lawyer to continually benefit from the advertising of his regular client, a lay intermediary, which advertises the services it furnishes relative to wills and trust agreements.

With regard to the first question the committee quotes with approval from Opinion No. 41 of the Committee on Professional Ethics and Grievances of the American Bar Association adopted September 17, 1931, which states:

> A member of the Association asks the Committee to express its opinion as to whether it is proper for a lawyer who is a director of a bank or trust company, to allow his name to appear as a director in its advertisements which offer its services to the public in drawing wills and trust agreements in making examination of titles.
>
> Canons 27, 35, 47 (adopted in 1937)
>
> This committee has already held, in Opinion 31, 'that it is improper for an attorney to aid a corporation to practice law or in any way to participate in or sanction such practice.' It is therefore improper for a lawyer to allow his name to appear as a director, officer or employee of a bank or trust company which, in its advertisements, offers to draw wills or trust agreements, give opinion on titles or perform other legal services.

With reference to the second question the committee cites the opinion of this committee of the same date relating to loan closings in which the same principles apply. Therefore we hold that it is highly

improper and unprofessional for a regular attorney for an institution which advertises its services relative to wills and trusts to allow said institution to regularly refer clients requiring such services to him where such referral is obviously done largely because of the close relationship of the attorney and the lay intermediary.

Although the Rules of Professional Conduct of the Bar appear in their entirety in Volume XXXIII of the *Journal*, those which are construed by the above eleven opinions are reprinted below for convenience of reference.

RULE 12. SETTING THE AMOUNT OF THE FEE.

In setting fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is both proper and desirable for a lawyer to utilize a suggested schedule of minimum fees adopted by his local or state Bar; however, it should not be his sole guide in determining the amount of his fee.

In setting fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

RULE 23. ATTITUDE TOWARD JURY.

All attempts to curry favor with the juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

RULE 27. ADVERTISING, DIRECT OR INDIRECT.

The most worthy and effective advertisement possible even for a young lawyer and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct.

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these rules of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the bar; schools attended, with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; membership and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; the fact of listings in other reputable law lists; the names and addresses of references; and the names of clients represented. A certificate of compliance with the Rules and Standards issued by the Special Committee on Law Lists may be treated as evidence that such list is reputable.

It is not improper for a lawyer who is admitted to practice as a proctor in admiralty to use that designation on his letterhead or shingle

or for a lawyer who has complied with the statutory requirements of admission to practice before the patent office to so use the designation "patent attorney" or "patent lawyer" or "trade-mark attorney" or "trade-mark lawyer" or any combination of those terms.

RULE 28. STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENTS.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relations or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick, the injured, the ignorant or others, to seek his professional services.

A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

RULE 35. INTERMEDIARIES.

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

A lawyer may accept employment from any organization such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

The established custom of receiving commercial collections through a lay agency is authorized. But it is not proper to solicit collections either directly or indirectly through any lay agency.

RULE 46. AIDING THE UNAUTHORIZED PRACTICE OF LAW.

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

RULES OF JUDICIAL ETHICS OF THE MISSISSIPPI STATE BAR

Preamble

In addition to the Rules for Professional Conduct of Lawyers which it has formulated and adopted, the Mississippi State Bar, mindful that the character and conduct of a judge shall never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Mississippi State Bar accordingly adopts the following rules, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

Ancient Precedents

"And I charged your judges at that time, saying Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you, bring it unto me, and I will hear it." *Deuteronomy,* I, 16-17.

"Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous." *Deuteronomy,* XVI, 19.

"We will not make any justiciaries, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it." Magna Carta, XLV.

"Judges ought to remember that their office is *jus dicere* not *jus dare;* to interpret law, and not to make law, or give law . . . .

"Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue. . . .

"Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions though pertinent. . . .

"The place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purprise thereof ought

to be preserved without scandal and corruption. . . ." BACON'S ESSAY *Of Judicature.*

JUDICIAL RULE 1. RELATIONS OF THE JUDICIARY.

The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

JUDICIAL RULE 2. THE PUBLIC INTEREST.

Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

JUDICIAL RULE 3. CONSTITUTIONAL OBLIGATIONS.

It is the duty of all judges to support the Constitution of the United States and the State of Mississippi; in so doing, they should fearlessly observe and apply fundamental limitations and guarantees.

JUDICIAL RULE 4. AVOIDANCE OF IMPROPRIETY.

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

JUDICIAL RULE 5. ESSENTIAL CONDUCT.

A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

JUDICIAL RULE 6. INDUSTRY.

A judge should exhibit an industry and application commensurate with the duties imposed upon him. There is rarely any excuse for a judge taking a case under advisement for a prolonged period. The undue delay in deciding a case is the equivalent of a denial of justice.

JUDICIAL RULE 7. PROMPTNESS.

A judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value

and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court.

Judicial Rule 8. Court Organization.

A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

It is desirable too, where the judicial system permits, that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.

Judicial Rule 9. Consideration for Jurors and Others.

A judge should be considerate of jurors, witnesses and others in attendance upon the court.

Judicial Rule 10. Courtesy and Civility.

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

A judge should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel, civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

Judicial Rule 11. Unprofessional Conduct of Attorneys and Counsel.

A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counsellors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.

Judicial Rule 12. Appointees of the Judiciary and Their Compensation.

Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve such amounts, he should be most scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

Judicial Rule 13. Kinship or Influence.

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

Judicial Rule 14. Independence.

A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

Judicial Rule 15. Interference in Conduct of Trial.

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

A judge should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

Judicial Rule 16. Ex Parte Applications.

A judge should discourage *ex parte* hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such *ex parte* applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based,

granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

Judicial Rule 17. Ex Parte Communications.

A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

Judicial Rule 18. Continuances.

Delay in the administration of justice is a common cause of complaint; counsel are frequently responsible for this delay. A judge, without being arbitrary or forcing cases unreasonably or unjustly to trial when unprepared, to the detriment of parties, may well endeavor to hold counsel to a proper appreciation of their duties to the public interest, to their own clients, and to the adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the court.

Judicial Rule 19. Judicial Opinions.

In disposing of controverted cases, a judge, as evidence that he has not disregarded or overlooked serious arguments of counsel, if he deems them to be of sufficient importance, should write an opinion indicating the reason for his actions. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that appellate courts in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous position of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly

increasing that in writing opinions which are to be published judges may well take this fact into consideration and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. Except in case of conscientious difference of opinion of fundamental principle, dissenting opinions should be discouraged in courts of last resort.

Judicial Rule 20. Influence of Decisions Upon the Development of the Law.

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controvery. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depositary of arbitrary power, but a judge under the sanction of law.

Judicial Rule 21. Idiosyncrasies and Inconsistencies.

Justice should not be moulded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

Judicial Rule 22. Review.

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure in this regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

Judicial Rule 23. Legislation.

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

Judicial Rule 24. Inconsistent Obligations.

A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official function.

Judicial Rule 25. Business Promotions and Solicitations for Charity.

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities; nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

Judicial Rule 26. Personal Investments and Relations.

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the Court. After his accession to the Bench, he should either dispose of such investments previously made, or rescue himself from participating in the decision of any case involving any enterprise whose securities are held or owned by the judge. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information, coming to him in a judicial capacity, for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

JUDICIAL RULE 27. EXECUTORSHIPS AND TRUSTEESHIPS.

While a judge is not disqualified from holding executorships or trusteeships he should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before him judicially, or to be involved in questions of law to be determined by him.

JUDICIAL RULE 28. PARTISAN POLITICS.

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, judges and candidates for judicial offices in all elections should abide by the terms, purposes and spirit of Sections 3191 and 3192 of the Mississippi Code of 1942, Recompiled, which provide as follows:

Sec. 3191. Candidates for judicial offices.

It shall be the duty of the judges of the circuit court to give a reasonable time and opportunity to the candidates for the office of Judge of the Supreme Court, circuit judge and chancellor to address the people during court terms. And in order to give further and every possible emphasis to the fact that the said judicial offices are not political but are to be held without favor and with absolute impartiality as to all persons, and because of the jurisdiction conferred upon the courts by this Act, the judges thereof should be as far removed as possible from any political affiliations or obligations within their party, it shall be unlawful for any candidate for any of the offices mentioned in this section to align himself with any candidate or candidates for any other office or with any political faction within his party at any time during the primary election campaign. And likewise it shall be unlawful for any candidate for any other office nominated or to be nominated at any primary election, wherein any candidate for any of the judicial offices in this section mentioned, is or are to be nominated, to align himself with any one or more of the candidates for said offices, or to take any part whatever in any nomination for any one or more of said judicial offices, except to cast his individual vote. Any candidate for any office, whether nominated with or without opposition, at any primary wherein a candidate for any one of the judicial offices herein mentioned is to be nominated who shall deliberately, knowingly and wilfully violate the provisions of this section shall forfeit his nomination, or if elected at the following general election by virtue of said nomination, his election shall be void.

Sec. 3192. Judicial candidates—contributions.

It shall be unlawful for any person, trustee, or corporation or any association of persons, by whatever name known, to make

any contribution, as the term contribution is hereinabove defined, to or for any candidate at any primary for nomination to any of the judicial offices mentioned in the foregoing section, save and except that a member of the bar, in active practice and in good standing and who himself is not a candidate for any office at said primary, may contribute in the aggregate as much as fifty dollars to any such candidate, in the manner, and in that manner only, that contributions are made to other candidates under the provisions of this Act.

Judicial Rule 29. Self-Interest.

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

Judicial Rule 30. Candidacy for Office.

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination. Candidates for judicial offices in all elections should abide by the terms, purposes and spirit of Sections 3191 and 3192 of the Mississippi Code of 1942, Recompiled, as quoted above in Judicial Rule 28.

Judicial Rule 31. Private Law Practice.

In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.

If forbidden to practice law, he should refrain from accepting any professional employment while in office.

He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor, if

such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law.

Judicial Rule 32. Gifts and Favors.

A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

Judicial Rule 33. Social Relations.

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct.

Judicial Rule 34. A Summary of Judicial Obligation.

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

Judicial Rule 35. Improper Publicizing of Court Proceedings.

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court and create misconceptions with respect thereto in mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of

publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

JUDICIAL RULE 36. CONDUCT OF COURT PROCEEDINGS.

Proceedings in court should be so conducted as to reflect the importance and seriousness of the inquiry to ascertain the truth.

The oath should be administered to witnesses in a manner calculated to impress them with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn separately and impressively at the bar of the court.

OUR DUTY TO THE LAW*

As a lawyer, I like to think that ours is a profession that has a front row seat at more of the fascinating events that mankind is a party to than any other. We are always in the arena in some form or fashion—frequently as combatant, sometimes as arbiter, occasionally as victim. The point is that we are where the action is, and ours is a life-long exercise in the activities of our fellow human beings. If nothing else is said of us worthy of remembrance, it ought to be at least that we live and work in the mainstream of human affairs. I would hope that we could have said of us that as a profession we had some hand in determining the way that stream flowed. The point that I make is simply that as lawyers, whether we like it or not, whether we want to be or not, we are irrevocably committed, by virtue of the fact that we are lawyers, to a direct participation in the shaping of the kind of society in which we live.

This is a duty from which, I must say frankly, I think too many of us have tried to shrink. There have been too many of us who have been unwilling to assert the influence that membership in the Bar imposes upon us. Too many of us have tended to underestimate the capacity for constructive direction that we are capable of giving to a society that is often frantically looking for guidance and direction. Let us better understand the significant role that we are privileged to play, indeed, that we must play if the institutions to which we give lip service—institutions like freedom and justice and honor—yes, and law—are going to survive as meaningful elements in the conduct of human affairs. These idealistic concepts and the more tangible systems to which they give rise, such as our judiciary, our legislatures, and our processes of political administration, can ultimately be protected only as the members of the Bar concern themselves with upholding these concepts and institutions.

One of America's most distinguished lawyers, the late Newton D. Baker, spoke of this obligation in an address to the Lawyers' Club of New York City:

> The lawyer is still, in the largest and best sense of the word, the politician. Every lawyer within the sound of my voice, nay, every lawyer everywhere, is, in his community, a man of affairs. The most immature lawyer from the least adequate law school has not stepped away with his diploma before he has acquired in the eyes of those who know him—sometimes wise eyes and sometimes very humble and uninstructed eyes—the character of a man competent to advise about public affairs. We, as mem-

*William F. Winter, State Treasurer, Jackson, Mississippi. An address delivered to the Hinds County Bar Ass'n on Sept. 21, 1965.

bers of the Bar, have an immense reservoir of strength and courage which we can contribute to the public of America if we are but of the mind to do it.

One of my deepest convictions is that so far as the institutional progress of a people is concerned, its salvation lies in the hands of the profession of the Bar. The history of the profession, in relation to the development of the U.S. proves that point. If one goes back to the days of the making of the Constitution in 1787, he finds that great document largely the fruit of the thought and the patriotism of the lawyers of that day. From that time down to this, all our forward steps in the remolding of our institutions or in devising new ones, have first been the thoughts of wise, sagacious and thoughtful lawyers, and they have been promulgated largely through the advocacy and explanations of lawyers.

With this premise of the lawyer's public responsibility hopefully established, let me cite what I consider to be the great and overriding challenge to us as a profession. It is a challenge the answer to which I feel can well determine the kind of nation we shall have in the future. I refer to the massive and frightening assaults which are being made in this country of ours on the established precepts of law and justice and good order.

I do not come here today as an alarmist, but I tell you that the structure of our political system cannot endure the emergence of a concept of human behavior such as we have seen in so many places in recent months that is based on the idea that if you don't like a law or a system of law-enforcement, you not only don't have to obey the law but you can deliberately defy it. What have been the recent consequences of the application of this standard? You have seen the headlines. You have been stunned, as I have, by the terrifying evidence of anarchy that has been abroad in our land.

We have had thrust upon us here in this great country, that has held itself out to the world as the fountainhead of responsible self-government based on a *respect* for the law, an awesome realization of massive *disrespect* for law.

We have seen the manifestations of this insidious malady that afflicts the body politic in the unbelievably destructive riots that have terrorized entire cities, and we have seen it in the shotgun blast in the dark hours of the night in our own city. We have heard it given expression by those black fanatics who would say to the Negro that he does not have to obey the white man's law or respect his property. We have heard it from some of the self-styled spokesmen for the South who have insisted that we could ignore laws that we didn't like and didn't agree with. We have had it emphasized in the nauseous cry of "police brutality," whenever a police officer attempts to uphold the

law, and we have had it aided and abetted by the paranoid abuse and vilification of the judicial system of our country.

You and I have got to understand, and our people have got to understand, that there cannot be any such thing as "limited lawlessness." When respect for one law—any law—is diminished, respect for all law suffers. If *one* of us can decide which laws we shall observe, then *everybody* can.

The point is that under our concept of government the emphasis has to be on massive law-observance rather than massive law-enforcement. We observe and try to obey the law not because we are forced to but because our respect for the rule of law overrides our private feelings. When we come to the point that any considerable number of our citizenry have so lost the respect for the rule of law that they will deliberately defy it, either openly or clandestinely, then our whole system is in danger.

The great genius of our political structure in this country has been grounded in the capacity of the overwhelming majority of our people to accept the rule of a smaller majority. This is not to say that the majority is always right and that we may not seek to change by proper means those laws and judicial decisions with which we do not agree. But, as lawyers, you and I must know that the highest test of courageous and responsible citizenship lies in our willingness to obey laws that we do not like. This is the greatest expression of support that we can give to our American system of jurisprudence. It is a position that you and I have a solemn obligation to affirm as *citizens,* but more than that as *members of the Bar.*

The people have a right to look to our profession for leadership in times like these. It is not enough that we acquire great skill in the trial of lawsuits and in the drafting of contracts. It is not enough that we achieve professional eminence and financial success. What is demanded of us and what our oath requires is that we use the prestige, the influence, and the knowledge of our profession to give direction to our state and nation in times of crisis.

In the past, I am sorry to say, too many of us here in Mississippi have not asserted the leadership that we were capable of in times of confusion and crisis. Too many of us lawyers have sat on our hands and by our silence and acquiescence have lent our support to positions that from a legal standpoint, if indeed not from a moral and ethical standpoint, have been patently wrong. We do our state and country no service—we do not advance the cause of responsible government—we add no lustre to our profession, when as lawyers we permit to go unchallenged the irresponsible and demagogic attacks from both the far left and the far right on our system of justice.

Let us make no mistake about it. This is our cause. This is a

challenge that strikes at the foundations of our profession, and if *we* do not meet it, then tell me who will or, indeed, who can meet it.

What we are seeing is a cold, calculated, massive assault on the concept of the rule of law. We are seeing men and women, cloaked in respectability many of them—some of them lawyers—peddling their subversive doctrines based on hate and fear and the defiance of law. We are seeing them working around the clock to destroy respect for the instrumentalities of the law—our police, our prosecutors, our judges, and our whole system of jurisprudence. And I want to make it clear right here that as far as I am concerned a hoodlum is a hoodlum, a mob is a mob, arson is arson, murder is murder, and anarchy is anarchy, whether it be practiced by the Black Muslims in California or the White Knights in Mississippi.

You say, "Well, what can we do about it?" I'll tell you what we can do about it if we just have enough faith in our profession and in the society of which we are a part. We can simply tell the people the truth. We can tell them that ours is not a perfect land and that it never will be. But we can also tell them that it is the best country that mankind, with God's help, has yet been able to develop.

We can tell them that our system of justice is not foolproof and that many inequities yet remain. But we can also tell them that it is the greatest process for the safeguarding of the rights of men that anybody has yet devised.

We can tell them that there is much that we need to improve in our political institutions at all levels. But we can also tell them that we cannot strengthen these institutions by destroying the confidence of the people in them through irrational criticism of those who administer them.

We can tell them that in our own state we have had heavy and perhaps unfairly harsh burdens to bear. But we can also tell them that we have too much to contribute to this nation's future to allow ourselves to sit forever brooding over lost causes.

We lawyers here in the South now have a rare opportunity to provide the kind of far-seeing leadership for our people that in another age the great lawyers of the Virginia dynasty—men like Mason and Marshall and Madison and Wythe—gave in the creation of our nation. We can do it by simply insisting on a respect for law. It may yet be recorded in history that the testing time for the processes of self-government in America was in the decade of the 1960's. It may well be written that the turbulent events of these present years marked a plateau in the progress of the American political dream. Whether this plateau will lead to a chasm into which all of our hopes and dreams will be dashed forever or whether, on the other hand, it is merely a level from which we move even higher up the majestic mountain of political great-

ness, can be determined by the kind of influences that we lawyers bring to bear on our national life. I like to think that here in Mississippi and in this great area of the country that we call the South is the responsive and responsible voice of a Bar and a people ready and willing to lend strength to the American character in this time of unrest.

I believe that here in this much misunderstood area of the country there is a tremendous reservoir of untapped leadership that for a long time has felt a frustration over its lack of opportunity to lead. We now are beginning to have that opportunity. Let us make certain then that in the exercise of this great responsibility, as lawyers we do not shrink from our task.

What better time can there be to make this resolution of leadership in defense of the rule of law than at this present hour. This is Constitution Week by proclamation of the President of the United States and the Governor of Mississippi. I would hope that this might be an occasion for the reaffirmation of our faith in and support of the concepts of freedom and justice that our profession is sworn to uphold. More than that, I would hope that this week might be the basis, too, for the emergence of a renewed sense of mission on the part of the Bar of its duty to define the duties of citizenship for our people.

Let us not underestimate what our great profession can do to help preserve our institutions and our ideals as a nation. Let us do more than we have done lest we lose our capacity to do anything. For as the *Virginia Bar News* wrote:

> The call to greatness, echoing from an earlier age, requires of our profession a renewed response, a fresh vigor, a sweeping determination to put the interests of commonwealth and nation above the insistent demands of prejudice and the interests of the moment.
>
> For the tone and character of our approach to problems is more important than specific solutions. The lawyer must bring to their solution the hard, cool intelligence of disciplined mind, capable of exposing the nostrums of the fuzzy minded while still retaining the vision which the fuzzy minded frequently possess and which we lose only at the peril of becoming petifoggers. We must not only think, we must think greatly. Accustomed to difficulties we are trained to know that to expect too much too soon is foolish. Yet while it is foolish to expect too much, it is to be lacking in faith and courage to dare too little.

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Recent Decisions

Admiralty—Extension of Seaworthiness Doctrine To Shore-Based Hopper

Plaintiff, a longshoreman, was employed as a member of a work gang by a stevedoring company to unload a vessel carrying a bulk cargo of nitrate of soda. A shore-based crane dipped the nitrate from the hold of the vessel and deposited it in a hopper on the pier. The hopper, owned by another shipping company and operated by the stevedoring company, was used for the purpose of conveniently loading trucks. When the hopper was filled, it was the plaintiff's job to pull down a heavy horizontal handle which opened the floor of the hopper and discharged the nitrate into a waiting truck. A bucket of nitrate was dropped into the hopper when it was empty, causing a sudden downward movement of the handle. The handle struck and injured the plaintiff. Plaintiff sued the shipowner on his warranty of seaworthiness, alleging that the release mechanism on the hopper was defective, thereby rendering the vessel unseaworthy. The United States District Court for the Eastern District of Pennsylvania held that the hopper was not an appliance appurtenant to the ship and therefore was not within the scope of the shipowner's warranty of seaworthiness. Held: Reversed. A hopper located on a pier has sufficient connection with a ship to be within the subject matter of the shipowner's warranty of seaworthiness. *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir. 1965).

Developments in admiralty law in the twentieth century have made the claim of unseaworthiness the principal device for recovery in personal injury actions by longshoremen and seamen.[1] When the hull, gear, and other appliances appurtenant to a ship are not reasonably fit for the purpose for which they were intended, the ship is said to be unseaworthy.[2] *Dixon v. The Cyrus*[3] was the earliest American case which spoke of unseaworthiness in connection with a ship's crew. In that case the court said that if a ship was not furnished with all the customary and necessary requisites for navigation, the seamen could leave the service of the ship without being prosecuted for desertion or forfeiting their wages. *The Osceola*[4] was a landmark decision which extended the remedy of seaworthiness to the injured seaman. The Court held that the vessel and her owner were liable in damages to a seaman for injuries received because of the unseaworthiness of the vessel. However, the shipowner was protected if the seaman's injury was sustained because of the negligence of a fellow crewman.[5] In 1920 the Jones Act[6] abolished the three defenses which employers often used to escape liability. These defenses were assumption of risk, contributory negligence, and the fellow

[1] Gilmore & Black, The Law of Admiralty § 6-38 (1957).

[2] *E.g.*, Mesle v. Kea S.S. Corp., 260 F.2d 747 (3d Cir. 1958). See generally Norris, Maritime Personal Injuries § 27 (1959).

[3] 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789).

[4] 189 U.S. 158 (1903).

[5] *Id.* at 175.

[6] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

servant rule. The act extended to the seaman the same rights that railroad employees enjoyed under the Federal Employers' Liability Act.[7] The Jones Act permits a seaman suffering personal injury in the course of his employment to maintain, at his election, an action at law for damages against his employer with a right to trial by jury. *International Stevedoring Co. v. Haverty*[8] extended the benefits of the Jones Act to longshoremen. The Court held that under the provisions of the act Congress intended the word seamen to include longshoremen employed in maritime work on navigable waters. The *Haverty* decision was welcomed relief for the longshoreman since an earlier attempt to obtain compensation for their injuries under the provisions of state workmen's compensation acts had been frustrated.[9] More relief came when Congress passed the Longshoremen's and Harbor Workers' Compensation Act.[10] The act is the longshoreman's exclusive remedy against his employer for injuries arising out of his employment and the act takes away the longshoreman's remedy under the Jones Act.[11] In *Mahnich v. Southern S.S. Co.*[12] the negligence of a crewman in furnishing a mate with a defective staging visited liability upon the shipowner for unseaworthiness. The United States Supreme Court, citing the case of *The Osceola* as authority, emphasized that a shipowner has an absolute and non-delegable duty to his crew to furnish them with a vessel that is seaworthy.[13]

The most famous maritime case to come before the Supreme Court in modern times was *Seas Shipping Co. v. Sieracki*.[14] It was in this case that the Court extended the seaworthiness doctrine to longshoremen who were injured aboard ship. The high court said that Congress did not intend the Longshoremen's and Harbor Workers' Compensation Act to be the longshoreman's only remedy in cases of personal injury.[15] In support of its holding, the Court referred to the section of the act which reserves to the longshoreman a right to proceed against third persons responsible for his injury.[16] The *Sieracki* case set the stage for the extension of the seaworthiness doctrine to other maritime workers. In 1953 a carpenter injured while working on a ship docked in navigable waters recovered for his injuries because of the unseaworthiness of the vessel.[17] The Court reasoned that carpenters needed protection from unseaworthy vessels just as much as longshoremen or seamen. Since all were exposed to the same dangers, all should be entitled to the same remedies under the law.[18] After the *Pope & Talbot, Inc. v. Hawn*[19]

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[7]53 Stat. 1404 (1939), 45 U.S.C. §§ 51-60 (1964).

[8]272 U.S. 50 (1926).

[9]Southern Pacific Co. v. Jensen, 244 U.S. 205, 214-15 (1917).

[10]44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1964).

[11]44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964).

[12]321 U.S. 96 (1944).

[13]*Id.* at 101.

[14]328 U.S. 85 (1946).

[15]Id. at 101-02.

[16]73 Stat. 391 (1959), 33 U.S.C. § 933(a) (1964).

[17]Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

[18]*Id.* at 412-13.

[19]346 U.S. 406 (1953).

decision longshoremen had the compensation remedy, the right to recover from the shipowner for unseaworthiness, and the right to recover from the shipowner for negligence which did not constitute unseaworthiness. One year later the Court extended the shipowner's warranty of seaworthiness to equipment brought on board ship by a stevedore who had contracted to unload the ship.[20] In an unprecedented decision, the Supreme Court put the seaworthiness doctrine ashore in the case of *Gutierrez v. Waterman S.S. Corp.*[21] In this case, beans packed in broken bags spilled on the dock while being unloaded and a longshoreman slipped on them and was injured. The Court held that the ship had an absolute duty, which could not be delegated, to provide the longshoreman with a seaworthy ship and gear, as well as to provide seaworthy cargo containers.[22] This duty applies to longshoremen unloading the vessel whether they are standing aboard the ship or completely off the ship on the pier.[23]

The cases starting with *Sieracki* and ending with *Spann* represent a shocking expansion of the seaworthiness doctrine to a vast army of maritime workers who have been provided with an adequate statutory remedy in the form of the Longshoremen's and Harbor Workers' Compensation Act. *Spann* has extended the shipowner's warranty of seaworthiness to shore-based equipment, making the shipowner liable for injuries caused by these shore-based instrumentalities, which he does not own, and over which he exercises no control. This case, coupled with *Sieracki, Hawn,* and *Gutierrez,* makes the shipowner a virtual insurer for all injuries, to all persons injured aboard the vessel or at dockside. It is submitted that it is time for the present line of cases to be reversed and for the seaworthiness doctrine to be limited to those for whom it was originally intended—seamen. The *Spann* case afforded the court of appeals an excellent opportunity to halt this runaway doctrine, yet it by-passed the opportunity and allowed the shipowner's warranty of seaworthiness to be pushed further from the vessel. The doctrine of seaworthiness was initially expanded through judicial legislation. It now appears that congressional legislation is the only effective way to curtail the courts' abuse of this doctrine.

Robert K. Upchurch

Civil Rights—Tavern Not a Place of Public Accommodation Within Meaning of Civil Rights Act of 1964

Petitioner, a Negro who was arrested when he refused to leave a tavern, brought an action seeking damages for his arrest and an injunction to restrain the operator of the tavern from refusing to serve him. The trial court dismissed the complaint and the petitioner appealed only from the denial of the injunction. Petitioner relied on title II of the Civil Rights Act of 1964,[1] which provides in part for injunctive relief against

[20]Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954).

[21]373 U.S. 206 (1963).

[22]*Id.* at 211-12.

[23]*Id.* at 215.

[1]Civil Rights Act of 1964 § 201, 78 Stat. 243, 42 U.S.C. § 2000a (1964).

discrimination in "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises. . . ." HELD: Injunction denied. A tavern is not a place of public accommodation within the meaning of the Civil Rights Act of 1964, since beer is not food within the meaning of the act. *Cuevas v. Sdrales*, 344 F.2d 1019 (10th Cir. 1965).

The close of the Civil War and the failure of the Federal Civil Rights Act of 1875[2] brought an abundance of state legislation prohibiting discrimination, much of which had provisions directed at ending discrimination in public accommodations.[3] Most of this early legislation concerning public accommodations enumerated certain places to be covered and followed with a broad clause, such as "all other places of public accommodation."[4] This early legislation was not as broad as it appeared, since the courts usually limited the scope of the laws by using the principle of ejusdem generis.[5] Such courts held that this statutory law was an abrogation of the common law principle that a private proprietor had the right to serve whomever he pleased; therefore, the courts strictly interpreted the language of the statutes, limiting the words "all other places of public accommodation" to mean all other places of a similar nature as those listed.[6] Beauty parlors,[7] soda fountains,[8] cemeteries,[9] apparel shops,[10] and billiard parlors[11] were thus held not to be places of public accommodation. The early courts also tended to find that bars and saloons were not places of public accommodation unless they were specifically mentioned in the statutes.[12] The various courts applied different reasoning as to why bars were not public accommodations. Some relied on the doctrine of ejusdem generis.[13] In *Keller v. Koerber*,[14] however, the court reasoned that since a bartender was under the primary statutory duty of not selling to minors, he should not be forced to sell to anyone. Furthermore, in *Gibbs v. Arras Bros.*[15] the court considered the denial of admission to all the places enumerated as the denial of a benefit, while the denial of entrance to a saloon would not deprive the plaintiff of any benefits. Some of the more recent state statutes concerning public accommodations have been amended, enlarging their scope by strengthening the language and further enumerat-

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[2]Act of Mar. 1, 1875, ch. 114, 18 Stat. 114.

[3]Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 547, 564 (1909).

[4]*E.g.*, Harvey Inc. v. Sissle, 53 Ohio App. 405, 5 N.E.2d 410 (1936).

[5]*E.g.*, Rhone v. Loomis, 74 Minn. 200, 77 N.W. 31 (1898).

[6]*E.g.*, Cecil v. Green, 161 Ill. 265, 43 N.E. 1105 (1896).

[7]Cambell v. Eichert, 155 Misc. 164, 278 N.Y. Supp. 946 (Sup. Ct. 1935).

[8]Cecil v. Green, 161 Ill. 265, 43 N.E. 1105 (1896).

[9]People *ex rel.* Gaskill v. Forest Home Cemetery Co., 258 Ill. 36, 101 N.E. 219 (1913).

[10]Harvey Inc. v. Sissle, 53 Ohio App. 405, 5 N.E.2d 410 (1936).

[11]Commonwealth v. Sylvester, 95 Mass. (13 Allen) 247 (1866).

[12]*E.g.*, Gibbs v. Arras Bros., Inc., 222 N.Y. 332, 118 N.E. 857 (1918).

[13]*E.g.*, Rhone v. Loomis, 74 Minn. 200, 77 N.W. 31 (1898).

[14]61 Ohio St. 388, 55 N.E. 1002 (1899).

[15]222 N.Y. 332, 118 N.E. 857 (1918).

ing the establishments covered.[16] In the states where there is not such a comprehensive statute, the courts have tended to extend the scope of establishments by judicial interpretations. Some courts have weakened the doctrine of ejusdem generis by holding that the diversity of types of businesses listed in the statute requires a more inclusive interpretation of the phrase "other places of public accommodation."[17] Thus, bowling alleys,[18] reducing salons,[19] skating rinks,[20] swimming pools,[21] and retail stores[22] have been held to be places of public accommodation. Likewise, in *Evans v. Fong Poy*[23] and *Bryant v. Rich's Grill*,[24] a bar was held to be a place of public accommodation.

The provisions of title II of the Civil Rights Act of 1964 forbid discrimination on the ground of race, color, religion, or national origin in the accommodations covered by the title.[25] There are four classes of establishments covered by title II, provided that the activities of the establishments affect commerce within the meaning of the act or that discrimination in the establishments is supported by state action. The four classes are: (1) lodgings, including all inns, hotels, motels, or other establishments providing lodging to transient guests; (2) dining facilities, including all restaurants, lunch counters, soda fountains, or other facilities principally engaged in selling food for consumption on the premises; (3) places of amusement, including any place of exhibition or entertainment, if it customarily presents performances which move in interstate commerce; and (4) captive facilities, including any establishment located on the premises of any establishment covered by the above three classes.[26] This new Federal Civil Rights Act differs from most of the state civil rights legislation on public accommodations in that the federal act more specifically defines the enterprises to which it applies and does not use the broad language "all other places of public accommodations."[27] Thus, to be held within the act, a bar must be within the definition of "a facility principally engaged in selling food for consumption on the premises." Beverages have long been considered food under the various pure food and drug laws.[28] In most instances under these

[16] *E.g.*, N.Y. Civ. Rights § 40.

[17] *E.g.*, Darius v. Apostolos, 68 Colo. 323, 190 Pac. 510 (1920).

[18] Central Amusement Co. v. District of Columbia, 121 A.2d 865 (D.C. Munic. Ct. App. 1956).

[19] Browning v. Slenderella Systems of Seattle, 54 Wash. 2d 440, 341 P.2d 859 (1959).

[20] Matter of Rollercade Skating Rink, 7 Race Rel. L. Rep. 985 (Ohio Civil Rights Commission 1962).

[21] Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949).

[22] Lambert v. Mandel's of California, 156 Cal. App. 2d 855, 319 P.2d 469 (1957).

[23] 42 Cal. App. 2d 320, 108 P.2d 942 (1941).

[24] 216 Mass. 344, 103 N.E. 925 (1914).

[25] Civil Rights Act of 1964 § 201, 78 Stat. 243, 42 U.S.C. § 2000a (a) (1964).

[26] *Ibid.*

[27] U.S. Bureau of Nat'l Affairs, The Civil Rights Act of 1964, at 81 (1964).

[28] *E.g.*, State v. Lief, 248 Mo. 722, 154 S.W. 1133 (1913).

statutes, intoxicants have also been considered as food.[29] However, the interpretations of the various state liquor laws distinguish clearly between a restaurant and a mere drinking place.[30] During the congressional debates of the Civil Rights Act of 1964, there was some skepticism that the act might apply to taverns and bars; however, the proponents of the bill gave assurance that it would not.[31] Senator Magnuson, Chairman of the Commerce Committee, in presenting the bill to the Senate for debate, said that his purpose was to provide a legislative history to aid the courts, and further stated that a bar was not principally engaged in selling food and, therefore, not governed by the act.[32] Throughout the congressional debates, there were comments by those favoring passage to the effect that the purpose of the title was not to eliminate discrimination in all public accommodations, but to eliminate it in the most troublesome areas.[33] A federal district court in Louisiana seemed little concerned with the question of legislative intent, prior state decisions, or definitions of beer when it denied an injunction to a Negro seeking admittance to a tavern. The court simply said that a bar was not enumerated and could not be connected to the establishments enumerated under title II.[34]

The present decision is quite significant, if for no other reason than because it is the first appellate case to determine the scope of businesses covered by the "dining establishments" clause of title II. The court could have interpreted the statute on its face without legislative history, as many courts have done, and considered beer as food since it does provide nutriment to the body. It could have followed the trend of the more recent state cases abandoning ejusdem generis and held that a bar is primarily engaged in serving food. Of course, there always looms the possibility that the Supreme Court will do just this; however, the likelihood of a reversal seems slight in the light of such a clear legislative intent. It is obvious merely from reading the act that Congress attempted not to encompass all public accommodations, but sought to regulate only the establishments listed and those of a similar nature. The clear wording of the act and numerous comments by such significant persons as Senator Magnuson and Senator Humphrey are ample proof that Congress meant to define specifically the enterprises and not to eliminate all discrimination. It is submitted that the court made the correct decision since the role of the courts should be to interpret the statutory law, which necessarily means seeking the legislative intent when it is ascertainable.

John M. Sims

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[29] *E.g.*, United States v. Sweet Valley Wine Co., 208 Fed. 85 (N.D. Ohio 1913). *Contra*, Bolivar v. Monnat, 232 App. Div. 33, 248 N.Y. Supp. 722 (Sup. Ct. 1931).

[30] *E.g.*, Savage v. State, 50 Tex. Crim. 199, 88 S.W. 351 (1905).

[31] 110 Cong. Rec. 7179 (1964) (remarks of Senator Magnuson).

[32] 110 Cong. Rec. 7175, 7177 (1964) (remarks of Senator Magnuson).

[33] 110 Cong. Rec. 6313 (1964) (remarks of Senator Humphrey); 110 Cong. Rec. 6337 (1964) (remarks of Senator Kuchel).

[34] Tyson v. Cazes, 238 F. Supp. 937 (E.D. La. 1965).

CONSTITUTIONAL LAW—ANTICONTRACEPTIVE STATUTE—
INVASION OF PRIVACY

The executive and medical directors of a "planned parenthood" organization were convicted in a Connecticut state court, as accessories,[1] for violation of state statutes which prohibited the use of "any drug, medicinal article or instrument for the purpose of preventing conception."[2] Under these statutes a married couple using contraceptives and a physician offering medical advice concerning their use were guilty of a misdemeanor. The conviction was affirmed by the highest state court of Connecticut. The petitioners appealed to the Supreme Court of the United States, challenging the constitutionality of the statutes under the due process clause of the fourteenth amendment. HELD: Reversed. State statutes which make it a criminal offense for a married couple to use contraceptives, or for physicians to be an accessory thereto, are invalid as unconstitutional invasions of their right of privacy. *Griswold v. Connecticut*, 85 Sup. Ct. 1678 (1965).

Although the Constitution does not specifically provide for a right of privacy,[3] the framers conferred, as against the Government, the right to be let alone.[4] This right to be let alone is the underlying theme of the Bill of Rights.[5] Thus, in *Boyd v. United States*,[6] the Court held that a compulsory production of a party's private papers, to be used as evidence against him in a criminal proceeding, was an invasion "on the part of the government and its employees of the sanctity of a man's home and the privacies of life,"[7] and was therefore violative of the search and seizure provision of the fourth amendment and the self-incrimination clause of the fifth amendment. The *Boyd* Court traced the origin of the right of privacy to Lord Camden's opinion in the early English case of *Entick v. Carrington*.[8] In *Wolf v. Colorado*,[9] though allowing the use of illegally obtained evidence in a state criminal proceeding, the Court stated that the fourth amendment secured the privacy of an individual against arbitrary intrusion by the police. The concept of a right of privacy was expanded in *Meyer v. Nebraska*.[10] In that case a state statute placing limitations on the teaching of foreign languages was held to be an unconstitutional interference with the right of a foreign language professor to teach and of parents to engage him for the purpose of instructing their children. Two years later, in *Pierce v. Society of Sisters*,[11] the Court declared that a state law requiring compulsory public school education of children interfered unreasonably with

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[1]CONN. GEN. STAT. REV. § 54-196 (1958).

[2]CONN. GEN. STAT. REV. § 53-32 (1958).

[3]Prudential Ins. Co. of America v. Cheek, 259 U.S. 530, 543 (1922).

[4]Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[5]Griswold, *The Right To Be Let Alone*, 55 NW. U.L. REV. 216, 217 (1960).

[6]116 U.S. 616 (1885).

[7]*Id.* at 630.

[8]19 Howell's St. Tr. 1029 (C.P. 1765).

[9]338 U.S. 25, 27 (1949).

[10]262 U.S. 390, 400 (1923).

[11]268 U.S. 510, 534 (1925).

the liberty of parents and guardians to direct the upbringing and education of children under their control. In both *Meyer* and *Pierce* the state statutes were found to be unconstitutional under the first amendment as made applicable to the states by the fourteenth amendment. Still other amendments have been interpreted so as to recognize the right. Justice Harlan, in a dissenting opinion in *Poe v. Ullman*,[12] stated that that aspect of liberty which embraces the concept of the privacy of the home receives protection from the third and fourth amendments. This concept of privacy is a part of the "ordered liberty" assured against state action by the fourteenth amendment.[13] From a consideration of the foregoing, it appears that while the right of privacy is not contained in any one amendment, it does emanate from the various guarantees of the Bill of Rights, as made applicable to the states by the fourteenth amendment. Under certain circumstances, however, a state's interests will be considered to outweigh individual rights of privacy.[14] Compulsory small-pox vaccination[15] and sterilization of inmates in mental institutions suffering from an hereditary form of insanity[16] are instances where the state's invasion of the individual's right of privacy has been upheld. Where there is such an invasion, the exercise thereof may be neither arbitrary nor oppressive but must bear a real and substantial relation to the public health, public safety, public morals, or some other phase of the general welfare.[17]

The federal government[18] and more than half the states,[19] including Mississippi, [20] now have in force some form of birth control legislation. To the extent that the legislation is designed to keep the traffic in contraceptives restricted to professional channels, it has been uniformly upheld.[21] Thus, a city ordinance which provided that contraceptives could be neither displayed nor advertised and that they could only be sold by licensed pharmacists was sustained.[22] Analogously, a state statute making one a disorderly person who "without just cause" exposes for sale anything designed for the prevention of conception was interpreted as prohibiting the promiscuous and indiscriminate sale of contraceptives through vending machines.[23] Some state legislation, even where restricted to professional channels, has been interpreted as prohibiting traffic in contraceptives.[24] Thus, in *Commonwealth v. Gardner*,[25]

[12]367 U.S. 497, 549 (1961) (Harlan, J., dissenting).

[13]Mapp v. Ohio, 367 U.S. 643, 660 (1961).

[14]Uphaus v. Wyman, 360 U.S. 72, 81 (1959).

[15]*E.g.*, Zucht v. King, 260 U.S. 174 (1922).

[16]Buck v. Bell, 274 U.S. 200 (1927).

[17]Liggett Co. v. Baldridge, 278 U.S. 105 (1928).

[18]18 U.S.C. §§ 1461-62 (1964); Tariff Act of 1930, 46 Stat. 688, 19 U.S.C. § 1305 (1964). See generally Note, 50 YALE L.J. 682 (1941).

[19]See 70 YALE L.J. 322, 333 App. A (1960).

[20]MISS. CODE ANN. § 2289 (1956).

[21]See Annot., 96 A.L.R.2d 955 (1964).

[22]People v. Pennock, 294 Mich. 578, 293 N.W. 759 (1940).

[23]Sanitary Vendors, Inc. v. Byrne, 40 N.J. 157, 190 A.2d 876 (1963).

[24]State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940). *Contra,* Planned Parenthood Comm. v. Maricopa County, 92 Ariz. 231, 375 P.2d 719 (1962).

[25]300 Mass. 372, 15 N.E.2d 222 (1938).

the court refused to allow an exception for physicians under a statute proscribing traffic in contraceptive devices, even though prevention of conception was necessary for the preservation of life and health. The Mississippi statute, which has not been interpreted by the courts of this state, contains a broad prohibition against the sale, possession, manufacture, or advertisement of contraceptive devices and the giving of information in relation thereto. Prior to the decision in the instant case, the question of the constitutional validity of the birth control statutes had not been before the Supreme Court, although the dissent in *Poe*[26] did consider the matter.

It is submitted that the existing birth control legislation in Mississippi is, by its own language, inapplicable to married couples. It is believed that the statutory language, "gives information orally," could be interpreted as limiting the right of a licensed physician to advise a patient in regard to the use of contraceptives. To the extent that the statute is so construed, it will be invalid under the right of privacy theory espoused by the Court in the principal case, and seemingly, as an unconstitutional limitation of their freedom to practice medicine free from arbitrary restraints, a matter as yet not litigated before the Supreme Court.[27] Insofar as the statute prohibits the indiscriminate sale of contraceptives, even by licensed pharmacists, it should be upheld as having a real and substantial relation to public morals and therefore a proper subject for the exercise of the state's police power. It is emphasized that no protection will be afforded owners of coin-operated machines that dispense contraceptives. Finally, it is respectfully submitted that the Court used unfortunate language in holding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees,"[28] said guarantees creating zones of privacy. This statement is of its nature so abstract and imprecise as to offer few guidelines for courts to follow. It will have a tendency to increase litigation, as there is little indication as to what conduct will be specifically secure from state action. Furthermore, state legislatures, because of the nebulous language of the Court, will encounter unnecessary difficulties as they draft new laws to replace those invalidated, in whole or in part, by the holding in the instant case. The Court might better have worded its opinion in such a manner as to provide for a *balancing of the interests* of the state and the individual, with the state prevailing only where necessary for the accomplishment of a permissible state policy.

Samuel H. Wilkins

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[26]367 U.S. at 509.

[27]See Tileston v. Ullman, 318 U.S. 44 (1943), where the court intimated that had the question been raised, the physician's right would have been upheld.

[28]85 Sup. Ct. at 1681.

Constitutional Law—Area Restrictions on the Right To Travel—Passport Denial

Petitioner, a citizen of the United States, applied to the State Department during 1962 to have his passport validated for travel to Cuba. Pursuant to regulations[1] promulgated by the Secretary of State which, in general, prohibited travel to Cuba,[2] his request was denied. Petitioner brought suit in a three-judge federal court against the Secretary of State seeking a declaratory judgment decreeing that he was entitled under the Constitution to travel to Cuba and to have his passport validated for that purpose, and that the Secretary of State's restrictions upon travel to Cuba were invalid and the statutes upon which they were based were unconstitutional. The federal court granted the Secretary of State's motion for summary judgment,[3] and appeal was taken to the Supreme Court. Held: Affirmed. Under a statute providing that the Secretary of State may grant and issue passports under such rules as the President shall designate and prescribe, the Secretary of State is authorized to adopt area restrictions on foreign policy considerations; such authority is not the result of an improper delegation of the legislative power, and the exercise of that authority does not deny passport applicants their first or fifth amendment rights. *Zemel v. Rusk*, 381 U.S. 1 (1965).

Despite the constitutional provision requiring that all legislative powers of the national government be vested in Congress,[4] legislative power, throughout American history, has been delegated to the federal executive. The delegation of power was at first confined to allowing the executive to determine simple facts or conditions on which the operation or application of a statute was contingent.[5] It was later extended to permit the President to pass on more complicated facts which necessarily involved some exercise of discretion,[6] and then on still more complicated facts which allowed the executive even broader discretion.[7] The trend has continued until it may be said that the President currently derives more power from congressional delegation than from the Constitution itself.[8] While Congress is permitted to delegate its power to the executive to determine some fact upon which the operation of a statute is conditioned or to promulgate regulations necessary to execute the law, it must fix definite standards to guide the President in his administration of the law.[9] Where foreign rather than domestic affairs are concerned, however, quite a different standard and principle is applied. In the field of foreign relations, the President may exercise broad authority. In addition to exercising the foreign affairs

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[1] 22 C.F.R. § 53.3(b) (1965).

[2] Public Notice 179, 26 Fed. Reg. 492 (1961).

[3] Zemel v. Rusk, 228 F. Supp. 65 (D. Conn. 1964).

[4] U.S. Const. art. I, § 1.

[5] The Cargo of Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813).

[6] Field v. Clark, 143 U.S. 649 (1892).

[7] J. W. Hampton Jr. & Co. v. United States, 276 U.S. 394 (1928).

[8] Vanderbilt, The Doctrine of the Separation of Powers and Its Present-Day Significance 79 (1953).

[9] Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

powers specifically granted to him by the Constitution,[10] the President may enter into executive agreements with foreign governments[11] and, alone or with Congress, deal with such matters as the assessment of treaty obligations,[12] acquisition of new lands,[13] establishment of embargoes,[14] and recognition of foreign governments.[15] Since both Congress and the executive have power in the foreign affairs area, Congress may delegate its powers to the President in terms broader than would be permissible if domestic affairs were alone involved.[16]

The concept that free people have a right to unrestricted freedom of movement goes back at least as far as King John and the fields of Runnymede when in 1215 the Magna Carta provided that "it shall be lawful in the future for anyone . . . to leave our kingdom and to return . . . except for a short period in time of war."[17] The fact that this concept was carried to these shores by the English settlers as a part of their heritage of the common law is evidenced by the colonial resentment to the English Crown's attempted curtailment of travel to the American colonies articulated in the Declaration of Independence,[18] and the freedom of travel guarantee expressly set out in the Articles of Confederation.[19] Although the Constitution makes no mention of the right to travel, it has been generally recognized that this means only that the framers regarded freedom of travel as basic and essential and something that was "assumed rather than rejected."[20] Moreover, recent cases leave little doubt that the right to travel abroad is guaranteed under the fifth amendment clause prohibiting Congress from depriving any person of "liberty" without due process of law.[21] Originally an American passport was not necessary for foreign travel and was regarded as merely a political document addressed to foreign powers certifying that the bearer was an American citizen and requesting that he be afforded safe and free passage.[22] Congress first passed legislation requiring passports for foreign travel during World War I.[23] Such legislation was revived during World War II,[24] and in 1952 Congress, substantially re-enacting these laws, made it unlawful, after the issuance of a presidential proclamation of a national emergency, to "depart from or enter" the United States without a passport.[25] A presidential proclama-

[10]U.S. CONST. art. II, §§ 2, 3.

[11]United States v. Pink, 315 U.S. 203 (1942).

[12]Ivancevic v. Artukovic, 211 F.2d 565 (1954).

[13]Jones v. United States, 137 U.S. 202 (1890).

[14]United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[15]United States v. Belmont, 301 U.S. 324 (1937).

[16]United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[17]MAGNA CARTA, cl. 42.

[18]For a detailed history see Note, 41 GEO. L.J. 63 (1952).

[19]ARTICLES OF CONFEDERATION, art. IV.

[20]Gould, *The Right to Travel and National Security*, 1961 WASH. U.L.Q. 334, 335 (1961).

[21]*E.g.*, Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952).

[22]Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692 (1835).

[23]40 Stat. 559 (1918), 8 U.S.C. § 1185(b) (1964).

[24]55 Stat. 252 (1941), 8 U.S.C. § 1185(b) (1964).

[25]66 Stat. 190 (1952), 8 U.S.C. § 1185(b) (1964).

tion of such an emergency in 1952 is still outstanding and, consequently, passports are currently required for foreign travel.[26] The State Department's practice, which developed after World War II, of denying passports and thus imposing travel restrictions has been aimed at both the individual because of his political beliefs or associations and at designated areas for foreign policy considerations. The Supreme Court in *Kent v. Dulles*[27] struck down the former practice, finding no authority in the Secretary of State to withhold passports based on characteristics peculiar to the applicant. In the absence of war or serious national emergency, no area control was imposed on American travel from 1776 until 1949,[28] when area restrictions were utilized for the first time as an instrument of our foreign policy[29] in banning travel to Hungary. Travel restrictions have since been similarly imposed, for and at various periods of time, on the Iron Curtain countries and Communist China,[30] those portions of Korea and Viet Nam under Communist control,[31] and some Middle Eastern countries.[32] Finally, in January 1961, the Secretary of State promulgated regulations which imposed the current restrictions on travel to Cuba.[33] These regulations were based upon an Executive Order which specifically authorized the Secretary to impose area restrictions,[34] that Executive Order being in turn based upon the Passport Act of 1926 which provides that "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe. . . ."[35] Absent any affirmative indication of congressional intention to authorize area restrictions, the Court in the noted case relied heavily upon the broad language of the Passport Act to find such authorization.

The descent of the Iron and Bamboo Curtains and the construction of the Berlin Wall generated from both the citizenry and government of the United States a storm of protest directed at those totalitarian governments which denied their citizens the fundamental human right to travel freely outside of their country. The United States's criticism of such a policy was in accord with the spirit of various international documents to which this country is a signatory, and which generally expound the belief that the right of free travel is a basic human right.[36] The Court reconciled the instant decision with *Kent* by deciding that an individual's right to travel may be circumscribed if the basis for the restriction does not relate to the character of the particular applicant, but is a result of foreign policy considerations which demand that

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[26]Pres. Proc. No. 3004, 67 Stat. c31 (1953).

[27]357 U.S. 116 (1958).

[28]22 Dep't State Bull. 399 (1949).

[29]Rauh & Pollitt, *Restrictions on the Right to Travel*, 13 W. Res. L. Rev. 128, 132 (1961).

[30]26 Dep't State Bull. 736 (1952).

[31]33 Dep't State Bull. 777 (1955).

[32]35 Dep't State Bull. 756 (1956).

[33]22 C.F.R. § 53.3(b) (1965).

[34]Exec. Order No. 7856, 3 Fed. Reg. 681, 687 (1938).

[35]Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) (1964).

[36]*E.g.*, *Universal Declaration of Human Rights*, art. 13(2), 19 Dep't State Bull. 753 (1948).

restrictions be imposed on a designated area. Area restrictions are theoretically valid because they apply to all persons. In practice, however, the State Department has permitted numerous exceptions when it felt that such exceptions were in the national interest.[37] The power to determine to whom these privileges may be extended gives the Secretary of State sufficient discretion to deny passports to critics of the administration and grant passports to its supporters, thereby permitting the possible circumvention of the very principles that the *Kent* decision sought to protect. Moreover, the failure of Congress to endorse expressly the imposition of peacetime area restrictions was not the result of its inadvertence. Within a month after the *Kent* decision, President Eisenhower sent a special message to Congress specifically requesting authority to impose area restrictions,[38] and, despite action in both houses,[39] that authority was not granted. Nevertheless, the Supreme Court, seemingly disregarding the legislative history of the Passport Act and departing from the spirit of *Kent*, has in the instant case inferred that Congress has resolved, through a broad grant of authority, the numerous and varied problems involved in restricting citizens' right to travel because of foreign policy considerations. Whether the national interest demands such a resolving of the question of first amendment rights is questionable.

Scott Parker Hemleben

Constitutional Law—Freedom of Speech and Press—Censorship of Obscenity

Defendants were the distributors of eight magazines sold in Jefferson County, Arkansas. An Arkansas prosecuting attorney brought an action to enjoin the distribution of certain issues of these magazines on the grounds that they were obscene. Under the Arkansas Act on Obscenity, "'Obscene' means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[1] The Chancery Court for Jefferson County found that the magazines in question were obscene and enjoined their distribution within the county. Defendants appealed alleging that the community standards to be applied were those of a national community and that under such standards the magazines were not obscene. Held: Affirmed. Literature may be banned as obscene if, when judged by local standards, its dominant theme appeals to prurient

[37]Statement by Robert F. Cartwright, Acting Director, Bureau of Security and Consular Affairs, in *Hearings on the Right to Travel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess., pt. 2, at 73 (1957).

[38]104 Cong. Rec. 13046 (1958).

[39]See H.R. 9069, 86th Cong., 1st Sess. (1959); S. 2770, 85th Cong., 1st Sess. (1957); S. 3998, S. 4137, 85th Cong., 2d Sess. (1958).

[1]Ark. Stat. Ann. § 41-2715 (Supp. 1961).

interest. *Gent v. State*, 393 S.W.2d 219 (Ark. 1965).

In 1957 the United States Supreme Court began candidly to examine obscenity regulation in light of possible conflicts with the constitutional guarantee of freedom of speech and press.[2] Its first significant decision in this area was *Roth v. United States*,[3] which, after declaring that obscenity could be censored, adopted the prurient interest test as a means of determining whether material was obscene. A number of states,[4] including Mississippi,[5] soon incorporated this formula into their obscenity acts. Unfortunately, the *Roth* test provided no practical guidelines for the courts to follow in deciding whether a particular piece of material could be suppressed.[6] Only two requirements were clearly established by *Roth*: (1) the whole of the material must be evaluated, not isolated excerpts; and, (2) the work must be judged by its effect upon the average person rather than the weak or susceptible.[7] The decisions following *Roth* have set up further requirements and provided a few specific examples of non-censorable material. *Smith v. California*[8] indicated that a showing of scienter was prerequisite to an obscenity conviction. *Manual Enterprises v. Day*[9] suggested that material could not be censored unless it was so patently offensive that it transgressed "community standards of decency." Four per curiam decisions handed down shortly after *Roth* dealt with items which the Court felt could not be banned. Among these items was a motion picture, *The Game of Love*, "with nothing omitted except those sexual consummations which are plainly suggested . . . ."[10] Other materials protected from censorship were: an imported assortment of nude photographs,[11] a homosexuals' magazine,[12] and two nudist publications.[13] Later, in *Kingsley Int'l Pictures Corp. v. Regents*,[14] the Court extended protection to the film *Lady Chatterley's Lover*, which had been banned on the grounds that it portrayed acts of sexual immorality as acceptable modes of conduct. These cases suggest that the post-*Roth* Court will not allow censorship

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[2]See generally Note, 35 NOTRE DAME LAW. 537 (1960).

[3]354 U.S. 476, 485, 487 (1957).

[4]*E.g.*, ALA. CODE tit. 14, § 374(3) (Supp. 1963); ARK. STAT. ANN. § 41-2715 (Supp. 1961); FLA. STAT. ANN. § 847.011 (1965); PA. STAT. ANN. tit. 18, § 4524 (1963).

[5]MISS. CODE ANN. § 2674-02 (Supp. 1964).

[6]See Roth v. United States, 354 U.S. 476, 511-12 (dissenting opinion).

[7]Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 53 (1960).

[8]361 U.S. 147, 154-55 (1959).

[9]370 U.S. 478, 482 (1962) (opinion of Harlan, J.).

[10]Times Film Corp. v. City of Chicago, 244 F.2d 432, 436 (7th Cir.), *rev'd per curiam*, 355 U.S. 35 (1957).

[11]Mounce v. United States, 355 U.S. 180 (1957), *vacating* United States v. 4200 Copies Int'l Journal, 134 F. Supp. 490 (E.D. Wash. 1955).

[12]One, Inc. v. Olesen, 355 U.S. 371 (1958), *reversing* 241 F.2d 772 (9th Cir. 1957).

[13]Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), *reversing* 249 F.2d 114 (D.C. Cir. 1957).

[14]360 U.S. 684 (1959).

of materials unless their *only* significant appeal is to prurient interest, *i.e.*, hard-core pornography.[15]

After *Roth*, it appeared certain that whenever an obscenity conviction was appealed to the Supreme Court, that forum would evaluate the offensive material in a de novo fashion.[16] However, the cases following *Roth* failed to identify the community whose standards the Court was purporting to apply in making its evaluation.[17] In *Jacobellis v. Ohio*[18] the Court had opportunity to make this identification. Unfortunately, the justices were so widely split that no opinion was adopted as the official expression of the Court, although six justices voted to reverse Jacobellis' conviction. Mr. Justice Brennan announced the Court's judgment and wrote a separate opinion in which he stated that obscenity was to be judged by a national standard.[19] Mr. Justice Goldberg joined in this opinion but also wrote a separate opinion of his own.[20] Four other justices concurred without expressing their opinions as to the applicable standard. The Chief Justice, with whom Mr. Justice Clark joined, wrote a dissenting opinion. In this dissent it was argued that the *Roth* formula called for the application of local community standards rather than a national standard. The Chief Justice expressed a view that, as a practical matter, there is no national standard and suggested that the Court should overrule a trial court's finding of obscenity only if such finding was not supported by sufficient evidence.[21] Mr. Justice Harlan dissented and wrote an opinion in which he stated that he would not interfere with censorship by the states of material which had been reasonably found to be obscene in a state judicial proceeding.[22] What then is the proper interpretation of the community standard test? Two members of the Court declared it to be a national standard. Two others declared it to be a local standard, and another stated that he would overrule a state's judicial finding of obscenity only where such finding was unreasonable.

Obviously the Court has not been able to reach a firm decision. The present case grows out of this difference of opinion. It appears that the *Gent* materials would not be censorable if a national standard were applied. The excerpts quoted in the Arkansas Supreme Court's opinion contained no "four-letter words" nor any explicit descriptions of fornication. They dealt with sex much more gently than the novels *Lady Chatterley's Lover*[23] and *Tropic of Cancer*,[24] both of which have been held

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[15]See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 842 (1964).

[16]See Roth v. United States, 354 U.S. 476, 498 (1957) (separate opinion).

[17]See O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAW. 1, 2, 7 (1964).

[18]378 U.S. 184 (1964) (separate opinion).

[19]*Id.* at 193.

[20]*Id.* at 197.

[21]*Id.* at 199-203.

[22]*Id.* at 203-04.

[23]Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960).

[24]*E.g.*, Attorney General v. The Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E.2d 328 (1962). See generally Gerber, *A Suggested Solution to the Riddle*

not obscene by other jurisdictions. Of course, these two novels are regarded by many as valuable literary works, and it seems likely that they have a degree of "redeeming social importance"[25] great enough to insulate their occasional vulgarity. The materials which were considered in the present case were nothing more than "girlie" magazines[26] whose stories were written with so little skill as to be ludicrous. The magazines also contained photographs of nude or briefly attired women, but these pictures apparently fell short of the degree of exposure which the Supreme Court allowed in *Sunshine Book Co. v. Summerfield*,[27] and the Arkansas court made only slight mention of them. Although the magazines involved in *Gent* were perhaps not obscene if judged by a national standard, they definitely were obscene according to the standards prevailing in Jefferson County, Arkansas. At the trial the chancellor and an advisory jury both found them to be obscene, and the Arkansas Supreme Court affirmed this adjudication. These proceedings constituted a proper determination that Arkansas' public policy does not favor the dissemination of the materials in question within Jefferson County. Arkansas' courts and legislature followed, as best they could, the constitutional formula devised by the Supreme Court. There could be no serious contention that the banned materials possessed literary value, or any value whatsoever, except their monetary worth as a commercial product. Why then should not the geographic community be allowed to exclude such materials from its boundaries? The *Gent* materials might not be obscene if judged by the standards of a sophisticated metropolitan area, but the prohibition which the Arkansas courts have decreed affects only a local community within which they definitely are obscene. There seems to be no sound policy basis for declaring that every local community's tolerance of obscenity be as great as that supposedly found in the nation's most worldly locales. Would it not be sufficient for the Supreme Court to establish, as it has for other constitutional freedoms,[28] certain general outlines beyond which the local communities may not go regardless of their local policy? So long as a community does not suppress the advocacy of ideas merely because they are unpopular in that community,[29] or prohibit sex from being dealt with as an integral part of a serious artistic, literary, or scientific work,[30] then it seems unreasonable for the United States Supreme Court to deprive that community of any discretion whatsoever in determining its own public policy. Should the *Gent* case be appealed, it is suggested that it should be affirmed.

Michael B. Taylor

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of Obscenity, 112 U. PA. L. REV. 834, 844-46 (1964).

[25]See Roth v. United States, 354 U.S. 476, 484-85 (1957).

[26]Gent v. State, 393 S.W.2d 219, 224 (Ark. 1965).

[27]355 U.S. 372 (1958), *reversing* 249 F.2d 114 (D.C. Cir. 1957).

[28]See generally O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAW. 1, 2-3 (1964).

[29]See Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959).

[30]See Grove Press, Inc. v. Christenberry, 276 F.2d 433, 439 (2d Cir. 1960).

CONSTITUTIONAL LAW—RIGHT OF ASSEMBLY—POWER OF POLICE TO PREVENT PUBLIC VIOLENCE

Appellant and five other Negro teenagers were playing in an integrated public park in Greenville, Mississippi. As they played, a large crowd of white people began to congregate. A call was put in to the police, and shortly thereafter five or six policemen arrived. They told some of the white people to disperse, and those who received the order obeyed it. Some threats of violence were made by a small group of teenage white boys, but they too dispersed when ordered to do so by the police. Nevertheless, the size of the crowd increased until it contained 150 to 200 people. The police felt that they could not control the crowd, and that a violent breach of the peace was imminent. Seeking to prevent this, the police asked the appellant and her companions to leave the park. Up to that time the Negro teenagers had broken no law or in any way acted improperly. They refused to leave. Another request and several orders by the police to leave were likewise refused. The police then arrested the appellant and her friends. The appellant was charged with breach of the peace and was tried, convicted, and sentenced to pay a fine of $100.00 and to serve 90 days in the city jail. The conviction was appealed to the Mississippi Supreme Court. HELD: Reversed. A person can not be convicted of a breach of the peace for refusing to obey a police order to leave a public park when he had not violated any law and his presence had not created an imminent threat of violence. *Bolton v. City of Greenville*, 178 So. 2d 667 (Miss. 1965).

The citizen's right to speak and assemble freely is protected against state infringement by the fourteenth amendment as it incorporates the first amendment.[1] The police have the duty of preserving the peace and protecting the privacy, lives, and property of the community.[2] Therefore, when the exercise of a constitutionally protected right is about to result in violence, the legitimate interests of the individual and the police are in irreconcilable conflict. The Constitution places on the Supreme Court the duty to resolve this conflict, the duty to say where the individual's rights end and the power of the police to prevent violence begins.[3] The problem is not so difficult when the individual has passed the bounds of protected speech by uttering fighting words,[4] inciting to riot,[5] or being obscene.[6] The problem is extremely difficult when the individual's behavior is within the protection of the Constitution, and the threat of violence comes from a crowd of onlookers who, without legal justification, violently object to the individual's speech or presence.[7] The Supreme Court has formulated only one general rule to be used in drawing the line between the individual's rights and the peace-keeping power of the police.[8] This is the famous clear and present

[1] *E.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963).
[2] *E.g.*, Thornhill v. Alabama, 310 U.S. 88, 105 (1940).
[3] Thomas v. Collins, 323 U.S. 516, 529 (1945).
[4] See, *e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[5] See Feiner v. New York, 340 U.S. 315, 321 (1951).
[6] See Roth v. United States, 354 U.S. 476, 484 (1957).
[7] See, *e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965).
[8] Annot., 93 L. Ed. 1151 (1950).

danger rule, which states that first amendment rights can not be restrained unless their exercise creates a clear and present danger of bringing about a substantial evil which the state has the power to prevent.[9] The Court has not always applied or followed this rule,[10] but its force is still strong.[11] In addition to this classic rule, a number of principles have emerged from the decisions of the Court. The state has the power to act to prevent violence,[12] but only considerations of the greatest urgency can justify restrictions on constitutional rights.[13] The state cannot abridge these rights to obviate slight inconveniences or annoyances.[14] The possibility of disorder by others cannot justify exclusion of persons from a place if they have a constitutional right to be there.[15] The police cannot simplify their job of keeping order by uncontrolled suppression of speakers.[16] An individual may not be deprived of his rights just because his exercise of them is unpopular.[17] These principles reflect the great concern the Court has for the constitutionally protected rights of the individual. However, no case has been found which has held that these rights are so dear that, rather than restrain them, the police must allow public riots to occur.

In the recent cases of *Cox v. Louisiana*[18] and *Edwards v. South Carolina*[19] the Court was faced with appeals from individuals who had been ordered by police to stop exercising their constitutionally protected rights, in part because the police felt that violence on the part of the onlookers was imminent. The appellants refused to stop and, because of their refusal, were arrested for breach of the peace. In both decisions the Court found, after making its own examination of the record, that there had not been any real threat of violence.[20] The situations were described as being a "far cry"[21] from the situation which existed in *Feiner v. New York*,[22] where someone in the crowd was pushing and shoving and converging upon the speaker. In *Cox* and *Edwards* the Court found only that the demonstrators were noisy and the onlookers tense, and that the demonstrations were sufficiently opposed by the majority of the community to attract a crowd and necessitate police

[9]Schenck v. United States, 249 U.S. 47, 52 (1919).

[10]See Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952).

[11]See, *e.g.*, Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

[12]*E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[13]See Speiser v. Randall, 357 U.S. 513, 521 (1958).

[14]See Schneider v. State, 308 U.S. 147, 162 (1939).

[15]Wright v. Georgia, 373 U.S. 284 (1963).

[16]Hague v. C.I.O., 307 U.S. 496, 516 (1939).

[17]See Edwards v. South Carolina, 372 U.S. 299, 237 (1963).

[18]379 U.S. 536 (1965).

[19]372 U.S. 229 (1963).

[20]Cox v. Louisiana, 379 U.S. 536, 550 (1965); Edwards v. South Carolina, 372 U.S. 229, 236 (1963).

[21]Cox v. Louisiana, 379 U.S. 536, 551 (1965); Edwards v. South Carolina, 372 U.S. 229, 236 (1963).

[22]340 U.S. 315 (1951).

protection.[23] In both cases the police protection was found to be "ample."[24] The Court's concern in these two cases with the threat-of-violence question suggests that the decisions might well have been different if the Court had found a real threat of violence.

There would seem to be little doubt that the decision in the instant case is in accord with the recent decisions of the Supreme Court. The threat of violence which prompted the police to arrest the appellant does not appear to be as strong as that which existed in either *Cox* or *Edwards*. The police seemed to be able to control the crowd, as evidenced by the fact that the white people who heard the orders to disperse obeyed them, including the only members of the crowd who made verbal threats of violence. It does not appear that the pushing, shoving, and converging upon the appellant which occurred in *Feiner* occurred here. The fact that the police felt that violence was imminent is not controlling in absence of facts which would justify that feeling.[25] The Mississippi Supreme Court in its opinion in the instant case stated that the proof was wholly insufficient to support and sustain the verdict. In its opinion the court does not make clear, at least to this writer, if the conviction was reversed because (1) the facts did not support the feeling of the police that violence was imminent, or (2) the appellant had done nothing at all wrong prior to being ordered to leave the park and therefore could not be convicted for a breach of the peace. It is submitted that the decisions of the Supreme Court compel the conclusion that the former reason is the correct one, and that the conduct of the appellant would have been immaterial if the facts had shown that a riot would have occurred had the police not arrested the appellant. The real question is *when*, not whether, the police may arrest to prevent violence. It is submitted that where, as in the instant case, the police arrest an individual for refusing an order to stop exercising his constitutionally protected rights in the interests of preventing a riot, the courts will not allow a conviction unless the facts show that (1) a riot was indeed imminent, and (2) the police had no other reasonable means of preventing the riot.

Robert A. Weems

Constitutional Law—Right of Indigent Defendant Who Discharges Retained Counsel to a Continuance for Purpose of Obtaining New Counsel

Defendant's mother employed reputable and capable attorneys to represent defendant who was to be prosecuted for assault and battery. On Friday before the case was to be tried on Monday, the defendant discharged the attorneys his mother had employed and asked them to request the court to continue the case so that he might have time to

[23]Cox v. Louisiana, 379 U.S. 536, 551 (1965); Edwards v. South Carolina, 372 372 U.S. 229, 236 (1963).

[24]Cox v. Louisiana, 379 U.S. 536, 550 (1965); Edwards v. South Carolina, 372 U.S. 229, 236 (1963).

[25]See, *e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963).

employ another attorney. His attorneys filed a notice of dismissal and withdrawal on the same day, but defendant's petition for a continuance was not presented until the day the case had been set for trial. He attempted to secure another attorney before the trial but was unable to pay the fee. The trial court allowed defendant's counsel to withdraw but denied the petition for a continuance, and defendant was tried and convicted without the benefit of counsel. In the subsequent hearing, it was adjudged that the defendant was an indigent, and an attorney was appointed to represent him on appeal. HELD: Reversed and remanded. One charged with a felony who discharges his counsel several days prior to the date set for trial and is unable to employ new counsel before the trial date must be granted a continuance to enable him to obtain new counsel. *Hogue v. State*, 178 So. 2d 677 (Miss. 1965).

Many states have statutory requirements which must be met before a continuance may be obtained.[1] However, the granting of a continuance is traditionally within the discretion of the trial judge, and such discretion is not necessarily abused if a defendant is compelled to defend without counsel.[2] Nevertheless, an arbitrary insistence upon haste in the face of a legitimate request for delay can make the assistance of counsel ineffective.[3] The right to appear by counsel includes the right to have an adequate period for counsel's preparation,[4] but the determination of the extent of this "adequate period" is subject to the discretion of the trial court.[5] It is a hopeless task to attempt to formulate exact rules from the cases which have decided what comprises an "adequate amount of time to prepare for trial," for the facts of each situation present a different problem, and each case has been decided with minimum reference to other cases.[6] The question of how long before trial an attorney should be allowed to withdraw without prejudicing the defendant presents the problem in a different aspect. An attorney who enters an appearance on behalf of an accused must receive the permission of the court before he may withdraw his appearance on the date set for trial, and there is a presumption that such an application will be denied unless good cause is shown why it should be granted.[7] In many instances counsel's request to withdraw within a few days of trial may impose a burden on the trial court. Therefore, trial judges have been allowed a wide range of discretion in refusing requests to withdraw. The vast majority of cases have held that the trial court does not abuse its discretion by denying counsel's request to withdraw on the day of trial.[8] When the moment of trial has arrived and the witnesses are at hand, the trial court has a right to weigh the impact on others in determining whether counsel should be permitted to with-

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[1] *E.g.*, MISS. CODE ANN. § 1520 (1956).

[2] Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

[3] *Ibid.*

[4] *E.g.*, Garrett v. State, 248 Ala. 612, 29 So. 2d 8 (1947).

[5] *E.g.*, Prescott v. State, 56 Okla. Crim. 259, 37 P.2d 830 (1934).

[6] BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 117 (1955).

[7] Altobella v. Priest, 153 Colo. 309, 385 P.2d 585 (1963).

[8] See, *e.g.*, Cullen v. State, 26 Wis. 2d 652, 133 N.W.2d 284 (1965).

draw.[9] Claims by attorneys that they have not received their fee[10] or have a personal relation to a party in the case[11] have been held not to be good cause for withdrawal. It has been determined that the state court has no duty to obtain new counsel for an indigent defendant when he will not accept the qualified counsel who has been appointed by the trial court.[12] *United States ex rel. Allen v. Rundle*[13] held that it was not error for the trial judge to refuse to appoint new counsel or to grant a continuance when the defendant did not express dissatisfaction with his counsel until three days before the trial, and the request for a change of attorney did not come until the day of trial. The general rule which evolves from the myriad of cases allowing or denying an attorney permission to withdraw is that a defendant has the right to discharge his counsel and substitute another at any time during the proceedings, but "this right is not so absolute that its exercise may not be denied where it will unduly prejudice the other party or interfere with the administration of justice."[14] It has also been decided that once an accused has elected to proceed with the aid of counsel, he will not be allowed to advance successfully an insincere claim of his right to defend himself in order to delay or obstruct the proceeding against him.[15]

Three cases[16] in which the court permitted counsel to withdraw because of a misunderstanding between the accused and his counsel laid the course which the Mississippi Supreme Court followed in *Winter v. State*.[17] Even though the accused was found derelict in each case, the court reversed the conviction and remanded the course in order to see that the defendant might have time to secure counsel. In the *Winter* case it was stated that this is the procedure which will be followed whenever this question arises. However, in *Augustine v. State*,[18] the Mississippi Supreme Court held that it was not error for the trial court to refuse to permit counsel for the accused to withdraw even though counsel had shown good cause for withdrawal. The court said, "the test is whether the accused has been protected, so far as counsel can do so, in all of his legal rights."[19]

It is frequently to the advantage of the defendant to delay his trial for as long as possible. If the right to discharge counsel were held to be an unqualified right, a defendant in a criminal proceeding would be able to delay his trial until he had exhausted his ability to obtain new counsel, and such a result would seriously hamper the

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[9]*Ibid.*

[10]*E.g.*, Greene v. State, 233 Md. 274, 196 A.2d 454 (1964).

[11]See, *e.g.*, Augustine v. State, 201 Miss. 277, 28 So. 2d 243 (1946).

[12]See United States *ex rel.* O'Neill v. Rundle, 230 F. Supp. 323 (E.D. Pa. 1964).

[13]233 F. Supp. 633 (E.D. Pa. 1964).

[14]State v. Truman, 124 Vt. 285, 204 A.2d 93, 97 (1964).

[15]See United States v. Gutterman, 147 F.2d 540 (2d Cir. 1945).

[16]Mabry v. State, 245 Miss. 143, 149 So. 2d 25 (1963); Blakeney v. State, 228 Miss. 162, 87 So. 2d 472 (1956); Gray v. State, 223 Miss. 554, 78 So. 2d 588 (1955).

[17]247 Miss. 640, 157 So. 2d 127 (1963).

[18]201 Miss. 277, 28 So. 2d 243 (1946).

[19]*Id.* at 293, 28 So. 2d at 247-48.

effective prosecution of crime.[20] It appears that if the trial courts of Mississippi are lenient in allowing withdrawal of counsel, *Hogue v. State*[21] could become a device by which most accused, and surely any indigent defendant, could gain a continuance for the purpose of obtaining new counsel even though he was derelict in the discharge of his retained counsel. However, the *Augustine* decision is ample authority for a court's refusing to allow withdrawal of counsel. Therefore, it is submitted that the trial courts of Mississippi must be very careful in allowing counsel to withdraw a short time before trial so that *Hogue* will not become an instrument by which accused may gain a continuance which otherwise could not be obtained.

Guthrie T. Abbott

Criminal Law—Burglary—Definition of Building

The defendant was found guilty of burglary under a Florida statute for breaking and entering an outside telephone booth with felonious intent. The statute provided that one who enters "any dwelling or store house, or any building . . ." shall be guilty of burglary.[1] The defendant appealed, contending the booth was not a building within the terms of the statute. Held: Affirmed. A telephone booth, located outside and apart from any other structure, constitutes a building within the terms of the burglary statute. *Perry v. State,* 174 So. 2d 55 (Fla. Dist. Ct. 1965).

Common law burglary may be generally defined as the breaking and entering of the dwelling house of another at night with a felonious intent.[2] It was not necessary that the dwelling proper be broken into, as long as some structure located within the curtilage was broken and entered.[3] As a general rule, edifices attached to the main dwelling were subject to common law burglary.[4] A house which had been occupied and to which the occupants intended to return was a dwelling, despite its vacancy at the time of the breaking and entering,[5] but a completed house into which the occupants had not yet moved was not a dwelling.[6] Since the term dwelling was limited to a place of habitation, many structures were not subject to burglary at common law.

Most states have enacted statutes extending the common law concept by providing that a person who breaks and enters any tent, shop, booth, store, or other building in which goods are stored or deposited, with intent to steal shall be guilty of burglary.[7] The courts now must

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[20]State v. Truman, 124 Vt. 285, 204 A.2d 93, 97-98 (1964).

[21]178 So. 2d 677 (Miss. 1965).

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[1]Fla. Stat. Ann. § 810.05 (1965).

[2]Perkins, Criminal Law 149 (1957).

[3]*E.g.*, People v. Aplin, 86 Mich. 393, 49 N.W. 148 (1891).

[4]See People v. Griffin, 77 Mich. 585, 43 N.W. 1061 (1889).

[5]*E.g.*, Haynes v. State, 180 Miss. 291, 177 So. 360 (1937).

[6]*E.g.*, Woods v. State, 186 Miss. 463, 191 So. 283 (1939).

[7]*E.g.*, Miss. Code Ann. § 2043 (Supp. 1964).

decide whether they will follow the concept extending burglary to those structures within the broad definition of "building" or limit burglary to a more restrictive interpretation. Courts following the broader interpretation seem to be in general agreement that a structure designed for the protection of property or the habitation of man is a building.[8] Some jurisdictions have held an unstationary structure is not subject to burglary, unless specifically provided for in the statute.[9] One state, however, held a sheep herder's wagon to be a building.[10] The size of the structure may be of importance. A chicken coop, approximately four feet square, was held not to be a building,[11] while one sixteen feet square was a building.[12] In order to constitute a building, there must be four walls and a roof. If the structure is open on one side, it may not come within the statutory construction of burglary.[13] A house which is being erected may be viewed as a building, and not a dwelling because it has not yet been completed.[14] To be the subject of burglary, the structure may be attached to another building.[15] Some jurisdictions have held a structure inside another building was not subject to burglary.[16] The term building has been extended to cover such structures as follow: popcorn stand;[17] cigar stand;[18] dog house;[19] bus;[20] tent;[21] powder magazine;[22] and cave.[23] Along with the extension of the burglary concept have come two restrictive limitations. Some states have adopted the view that burglary statutes should be strictly construed.[24] Another restriction is found in the application of ejusdem generis. The two concepts are generally used together as defenses to burglary.[25] The doctrine of ejusdem generis usually relates to legislative intent.[26] If specific objects are listed, followed by a general object, the court may hold that the legislature intended the general object to include only structures of the same class as those specifically enumerated in the statute.[27] While this doctrine has had some success,[28] it has

[8]*E.g.*, People v. Buyle, 22 Cal. App. 2d 143, 70 P.2d 955 (1937).
[9]Loftis v. State, 157 Tex. Crim. 569, 251 S.W.2d 411 (1952).
[10]State v. Ebel, 92 Mont. 413, 15 P.2d 233 (1932).
[11]State v. Crites, 110 W. Va. 36, 156 S.E. 847 (1931).
[12]Gillock v. People, 171 Ill. 307, 49 N.E. 712 (1898).
[13]People v. Gibbons, 206 Cal. 112, 273 Pac. 32 (1928).
[14]Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887).
[15]See, *e.g.*, People v. Miller, 95 Cal. App. 2d 631, 213 P.2d 534 (1950).
[16]*E.g.*, Dawalt v. State, 156 So. 2d 769 (Fla. Dist. Ct. 1963).
[17]See People v. Burley, 26 Cal. App. 2d 213, 79 P.2d 148 (1938).
[18]State v. Davis, 60 Wash. 2d 233, 373 P.2d 128 (1962).
[19]Carleton v. State, 29 Ohio App. 187, 163 N.E. 311 (1927).
[20]People v. McLaughlin, 156 Cal. App. 2d 291, 319 P.2d 365 (1957).
[21]Favro v. State, 39 Tex. Crim. 452, 46 S.W. 932 (1898).
[22]People v. Buyle, 22 Cal. App. 2d 143, 70 P.2d 955 (1937).
[23]State v. Sanders, 81 Kan. 836, 106 Pac. 1029 (1910).
[24]State v. Schuchmann, 133 Mo. 111, 33 S.W. 35 (1895).
[25]See Chaney v. State, 142 So. 104 (Ala. 1932).
[26]Gillock v. People, 171 Ill. 307, 49 N.E. 712 (1898).
[27]State v. Schuchmann, 133 Mo. 111, 33 S.W. 35 (1895).
[28]See Chaney v. State, 142 So. 104 (Ala. 1932).

been held inapplicable in other jurisdictions.[29] By inserting "other buildings" in the statute, it has been held that the legislature not only intended to subject those structures specifically enumerated, but also to include all types of structures known, or to become invented in the future.[30] This is indicative of the legislative intention to escape the limitations of the common law and develop a more comprehensive system for the protection of property.[31]

Extensive research has failed to reveal a case in Mississippi containing an issue similar to the one in question. Whether the Mississippi court should adopt a broad, comprehensive approach, or whether it should apply a more restrictive interpretation has yet to be resolved. The principal case should serve as a guide, for the statutes in Florida and Mississippi are almost identical. The Florida court held that the word "any" preceding the word "building" should be interpreted to express a legislative intent not to limit the term "building" to only those structures specifically enumerated in the statute. In Mississippi's statute, the word "other" precedes the term "building." This would seem to imply a legislative intention to evade the doctrine of ejusdem generis. Most states adopting statutes similar to the one in Mississippi have not limited "other buildings" by the doctrine of ejusdem generis, but have favored a more comprehensive approach. It is submitted that the Mississippi court would be justified in concluding that a telephone booth is a building. This, however, would be unnecessary. The Mississippi statute specifically provides for the breaking and entering of a "booth." In order for other jurisdictions to apply the more comprehensive approach, it was necessary to adopt the broad definition that a structure used for the protection or sheltering of property or the habitation of man was a "building." Consequently, structures located within other buildings were held to afford no such protection and were held not within the term "other buildings." While the more comprehensive approach should be followed in Mississippi, it is submitted that the broad definition of "building" should be no hindrance with respect to construing the term "booth." A booth located within another building should be the subject of burglary, even though it affords no protection for property. The term "booth" is a distinct entity separate from the other structures enumerated in the statute, and should have its own definition. It is believed that the Mississippi court will follow the majority view in adopting the more comprehensive approach to the term "building." It remains to be seen whether the court will adopt the same view with respect to the term "booth."

Bill P. Joyner

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[29] *E.g.*, Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960).

[30] *Ibid.*

[31] *Id.* at 562.

DOMESTIC RELATIONS—DUAL DIVORCE DECREES

The complainant filed a bill for divorce against her husband on grounds of habitual cruel and inhuman treatment. The husband answered denying the material allegations of the complaint and filed a cross-bill praying for a divorce on the same grounds. A final decree was issued granting both parties an absolute divorce. The wife and husband filed cross appeals. HELD: Reversed and remanded. Where, on the evidence, a divorce on the grounds of habitual cruel and inhuman treatment could be granted to either party or denied to both of them, a decree shall not be awarded to both parties. *Hinton v. Hinton,* 179 So. 2d 846 (Miss. 1965).

The general rule in family law appears to be that where both parties are equally at fault a divorce will not be granted.[1] This rule is based on the doctrine of recrimination, a defense which sets off concurrent marital offenses by denying relief to either party.[2] The doctrine has been supported on grounds of, "(1) the clean hands doctrine, (2) *in pari delicto,* (3) breach of mutually dependent covenants, (4) the compensation theory, and (5) that divorce is a remedy for the innocent spouse only."[3] Recrimination even finds support in sociological reasoning which maintains that it: (1) helps retain the family unit; (2) impedes immorality; and (3) insures the wife her property rights.[4] Notwithstanding such arguments, legal scholars have violently attacked the doctrine in Mississippi[5] and in other jurisdictions.[6] Possibly because of this opposition, the uncompromising doctrine of recrimination has been modified by statute[7] and by judicial use of the comparative rectitude doctrine, or balancing theory.[8] The recrimination doctrine has been further weakened by a resort to decrees which simply dissolve the marital relationship,[9] although some states refuse to allow such dissolutions.[10] Squarely facing the social issues, one court, quite early, recognized the harshness of the recrimination rule and granted dual divorces.[11] Such dual decrees have been acknowledged in federal court[12]

[1] *E.g.,* Bryan v. Bryan, 271 Ala. 625, 126 So. 2d 484 (1961). See generally 27A C.J.S. *Divorce* § 67 (1959).

[2] *E.g.,* Stoneburner v. Stoneburner, 11 Idaho 603, 83 Pac. 938 (1905). See generally BUNKLEY & MORSE, AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI § 4.03 (1957).

[3] Furlong, *Dual Divorce Decrees and Conciliation in Contemporary Family Law,* 2 WILLAMETTE L.J. 134, 150 n.64 (1962).

[4] Beamer, *The Doctrine of Recrimination in Divorce Proceedings,* 10 U. KAN. CITY L. REV. 213, 249-55 (1942).

[5] Bunkley, *The Doctrine of Recrimination in Divorce Law,* 20 MISS. L.J. 327 (1949).

[6] *E.g.,* Bradway, *The Myth of the Innocent Spouse,* 11 TUL. L. REV. 377 (1937).

[7] MISS. CODE ANN. § 2735.5 (Supp. 1964).

[8] *E.g.,* Gilbert v. Hutchinson, 135 So. 2d 283 (La. Ct. App. 1961). See generally 1 NELSON, DIVORCE AND ANNULMENT § 10.03 (2d ed. 1945).

[9] Moore v. Moore, 403 P.2d 823 (Ariz. Ct. App. 1965); Ackel v. Ackel, 57 Ariz. 14, 110 P.2d 238 (1941).

[10] Bronner v. Bronner, 267 S.W.2d 577 (Tex. Civ. App. 1953).

[11] Schirmer v. Schirmer, 84 Wash. 1, 145 Pac. 981 (1915).

[12] Burch v. Burch, 195 F.2d 799, 810 (3d Cir. 1952).

and also in California, the most populous state.[13] The issuing of dual divorce decrees is now completely acceptable in that jurisdiction.[14]

The few states that have accepted the concept of dual divorce evolved the procedure from strict recrimination[15] to judicial discretion,[16] or "comparative rectitude," to dual divorce.[17] On the other hand, one state initially granted dual divorces,[18] but subsequently has invalidated dissolution decrees,[19] and finally declared it "erroneous" to award divorce decrees to both parties.[20] Mississippi followed the strict doctrine of recrimination[21] until, by statute,[22] chancellors were allowed discretion in applying the doctrine. One other state has, however, found that such a discretionary statute[23] was not enough, and that jurisdiction has now enacted legislation which declares that "equal wrong shall not be a basis for refusing to grant a divorce," and if it is granted, "it shall be granted to both parties."[24] Essentially the same type statute has been recommended to the Mississippi legislature.[25] Legal writers have pointed out that dual divorce decrees: (1) help separating spouses' relationships by removing the won-loss characteristics of divorces; (2) reduce the chances of one parent attempting to influence the children by accusing the other parent of being found "guilty" in a divorce proceeding; (3) improve opportunities for equitable collateral decrees by leaving the parties on an equal footing; and (4) are another way of eliminating adversary type divorce proceedings.[26] The last mentioned goal has been achieved in some states by establishing special family courts to handle divorce cases and other marital problems.[27]

It should be noted that the instant case does not reaffirm the doctrine of recrimination. The opinion merely prohibits the practice of issuing dual decrees by remanding the case for an "appropriate decree." Such a ruling must mean that the decree should indicate a prevailing party. Other jurisdictions have felt that a reversal for such a reason was based on "sentiment rather than substance."[28] Since the court did not expound on its reasons for reversing the decree, nor give any practical policy argument, sentiment or personal value judgment appears to be the foundation of the decision. It is realized that the

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[13]DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598, 607 (1952) (dictum).

[14]*E.g.*, Baker v. Baker, 43 Cal. Rptr. 811 (Dist. Ct. App. 1965).

[15]Brazell v. Brazell, 54 Cal. App. 2d 458, 129 P.2d 117 (Dist. Ct. App. 1942).

[16]DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598, 604 (1952).

[17]Baker v. Baker, 43 Cal. Rptr. 811 (Dist. Ct. App. 1965).

[18]Simmons v. Simmons, 122 Fla. 325, 165 So. 45 (1936).

[19]Friedman v. Friedman, 100 So. 2d 167 (Fla. 1958).

[20]Mosca v. Mosca, 144 So. 2d 80 (Fla. Dist. Ct. App. 1962).

[21]*E.g.*, Oberlin v. Oberlin, 201 Miss. 228, 29 So. 2d 82 (1947).

[22]Miss. Code Ann. § 2735.5 (Supp. 1964).

[23]Okla. Stat. § 4547 (1893).

[24]Okla. Stat. Ann. tit. 12, § 1275 (1961).

[25]Bunkley, *The Doctrine of Recrimination in Divorce Law*, 20 Miss. L.J. 327, 335 (1949).

[26]Furlong, *Dual Divorce Decrees and Conciliation in Contemporary Family Law*, 2 Willamette L.J. 134, 162 (1962).

[27]Chute, *Divorce and the Family Court*, 18 Law & Contemp. Prob. 49 (1953).

[28]Schirmer v. Schirmer, 84 Wash. 1, 145 Pac. 981, 982 (1915).

court may have been concerned with the problem of alimony, but it is believed that the statutory powers of the chancellor, under section 2743 of the Mississippi Code, are broad enough to allow him equitably to decide whether under a dual divorce decree alimony should or should not be awarded. If, however, the court was concerned with the "guilt" of the parties, as the opinion implies, then Mississippi's policy toward divorce should be re-examined in the light of its present divorce and recrimination statutes and the latest treatises on divorce. A Mississippi writer has pointed out the use of the word "injured" rather than "innocent" in the divorce statute.[29] Quite logically, it is explained that to grant both parties a divorce, where such a decree is suitable, would be facing the realities of the present divorce practices and would be a step toward some sociological solution to marital breakups. There is some evidence that Mississippi's chancellors have made it a practice to grant both parties divorce decrees if the circumstances so warrant. It is interesting to note that such practices, prior to the decision in the instant case, had been tacitly approved by the supreme court in *Hinton v. Hinton*.[30] In that case the question of dual divorce was not presented for adjudication, but, as stated in the facts, the lower court had granted both parties a divorce. The Mississippi Supreme Court had no criticism of such a procedure and apparently felt it to be of little significance. Since the court did imply that dual divorces were acceptable, why is such a decree not now proper? In the light of the recently enacted recrimination statute, the earlier *Hinton* case, and the wording of the divorce statue, it is respectfully recommended that the court reconsider its policy toward divorce and allow dual divorce decrees.

William M. Rainey

Due Process—Requirement for State Court Jurisdiction Over a Nonresident for Commission of a Tort

Plaintiff brought suit for libel when "Life," a nationally circulated magazine published by defendant, printed an article concerning the disappearance of three civil rights workers in Neshoba County, Mississippi. Accompanying the article were certain pictures with captions which the plaintiff maintained were libelous. The defendant was not qualified to do business in Mississippi, and its only activities concerning persons in the state had been handled through its offices outside the state. These activities had consisted of buying stories and pictures from independant third parties, mailing solicitations to potential subscribers, sending salesmen to visit potential advertisers, and shipping magazines to wholesale distributers. Defendant appeared specially for the sole purpose of questioning the court's in personam jurisdiction. The circuit court dismissed the declaration for want of jurisdiction. Held: Affirmed. A nonresident defendant may not be subjected to judgment for doing an isolated single act, unless he has had the

[29]Bunkley, *The Doctrine of Recrimination in Divorce Law*, 20 Miss. L.J. 327, 334-35 (1949).

[30]239 Miss. 679, 124 So. 2d 844 (1960).

minimum contacts in Mississippi necessary to assure fair play and substantial justice. *Breckenridge v. Time, Inc.*, 179 So. 2d 781 (Miss. 1965).

It has been said that "the foundation of jurisdiction is physical power . . .,"[1] meaning that only so long as a person remained within the borders of a state was he subject to the jurisdiction of its courts. This is no longer true so far as state court jurisdiction over nonresidents is concerned. The first Supreme Court decision[2] allowing a single act to confer jurisdiction came in 1927, when, on noting that automobiles are dangerous machines, it was held that the due process clause of the fourteenth amendment was not contravened by a state court's assumption of jurisdiction over non-resident motorists. It has been recognized for some time that the doing of a tortious act may confer jurisdiction on a state court if the defendant was at the same time "doing business"[3] within the state. Likewise, if the defendant was domiciled in the forum state at the time he did an act and later removed to another state, he may have been subjected for that reason.[4] *International Shoe Co. v. Washington*[5] stated the rationale, based on reasonableness, by which single act jurisdiction should be determined. The Court said that in order to subject a defendant to a judgment in personam, due process requires that he have certain minimum contacts with the forum such that the maintenance of the suit will not offend traditional notions of fair play and substantial justice. It was emphasized that the traditional notion of "doing business" is not a requisite to jurisdiction.[6] The holding applies an extremely flexible standard, and the Court has yet to answer specifically whether an action based on an isolated tort can properly subject a nonresident to suit.[7] However, it has been said that definite limitations exist on how far states can increase their jurisdictional powers under *International Shoe*, for a purposeful act out of which the cause of action arises must be done by the defendant in the forum state.[8]

Until section 1437 of the Mississippi Code was enacted in 1940, the Mississippi courts could maintain jurisdiction only over those served with process within the state, nonresident motorists,[9] and foreign corporations "doing business" in the state.[10] Section 1437 originally provided that jurisdiction may be exercised over any nonresident person, partnership, or corporation "who shall do any business or perform any character of work or service in this state." The statute was held constitutional by the federal court of appeals[11] and later by the Mississippi

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[1]McDonald v. Mabee, 243 U.S. 90 (1917).

[2]Hess v. Pawloski, 274 U.S. 352 (1927).

[3]See Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[4]Owens v. Superior Court of Los Angeles County, 52 Cal. 2d 822, 345 P.2d. 921 (1959).

[5]326 U.S. 310 (1945).

[6]See *id.* at 319.

[7]Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951).

[8]See Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[9]Miss. Code Ann. § 1845 (Supp. 1938).

[10]Miss. Code Ann. § 4166 (1930).

[11]Sugg v. Hendrix, 142 F.2d 740 (5th Cir. 1944).

court,[12] but initially only as applied to defendants subject to state regulations under its police powers. Shortly thereafter, persons not subject to such state regulation were included.[13] Although the statute did not specifically require "doing business" as a basis for jurisdiction, the Mississippi courts have, since its enactment, expressed decisions in terms of doing business.[14] What constituted doing business has been determined by the facts and circumstances of each case.[15] Whether there was continuous and systematic activity has often been a factor.[16] It might also be significant if the acts relied on to establish "doing business" were the same as those from which the cause of action arose.[17] However, a pattern has not been established which would indicate with any certainty what does constitute "doing business," and, indeed, the court has said that no test can be used uniformly since it is not the quantity, but the quality and nature of the activity which is determinative.[18] A corporation was not "doing business" when it sent an agent into the state to secure orders to be accepted outside the state,[19] but a corporation was "doing business" when it sent an agent to purchase pecans in the state for shipment to Chicago.[20] In recent decisions[21] the minimum contacts—fairness test of *International Shoe* has been adopted, and in *Mladinich v. Kohn*[22] it was required that the defendant must purposefully do some act from which the cause of action arises. The Mississippi court has consistently maintained a more conservative approach than the trend of the United States Supreme Court's decisions.[23] One decision found a corporation not doing business under circumstances "taxing the credulity of the ordinary mind."[24] While citing *International Shoe* and other liberal decisions, courts have applied the Mississippi law so that a nonresident who has had far more than the minimal contacts required by those cases may still not be doing business.[25] Section 1437 of the Mississippi Code was amended on July 1, 1964, to

[12]See Condon v. Snipes, 205 Miss. 306, 326, 38 So. 2d 752, 756 (1949).

[13]Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 884, 50 So. 2d 615, 624 (1951).

[14]*E.g.*, Jarrard Motors, Inc. v. Jackson Auto & Supply Co., 237 Miss. 660, 670, 115 So. 2d 309, 313 (1959).

[15]*Id.* at 670, 115 So. 2d at 313.

[16]*E.g.*, Century Brick Corp. of America v. Carroll, 247 Miss. 514, 524, 153 So. 2d 683, 686 (1963).

[17]Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 879, 50 So. 2d 615, 622 (1951).

[18]*Id.* at 883, 50 So. 2d at 623.

[19]Saxony Mills v. Wagner, 94 Miss. 233, 47 So. 899 (1908).

[20]Gridley, Maxon & Co. v. Turner, 179 Miss. 890, 176 So. 733, 177 So. 362 (1937) (suggestion of error).

[21]*E.g.*, Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 881, 50 So. 2d 615, 622 (1951).

[22]250 Miss. 138, 148, 164 So. 2d 785, 790 (1964).

[23]Walker v. Savell, 335 F.2d 536 (5th Cir. 1964).

[24]Lee v. Memphis Publishing Co., 195 Miss. 264, 283, 14 So. 2d 351, 355 (1943) (Roberds, J., dissenting).

[25]See Walker v. Savell, 335 F.2d 536 (5th Cir. 1964); Mississippi Wood Preserving Co. v. Rothschild, 201 F.2d 233 (5th Cir. 1953).

provide that a nonresident committing a tort in whole or in part in the state against a resident shall be deemed to be doing business in Mississippi. The instant case is the first interpretation of the amended statute.

Several state legislatures have enacted statutes similar to section 1437 as amended which have been upheld by state courts.[26] Since a tort was alleged in *Breckenridge*, this is a case which was intended to fall within this state's jurisdiction. Because the court would apply this statute if possible to do so within the framework of the Supreme Court's language, the holding indicates that the court feels *International Shoe* and *Hanson v. Denckla*[27] absolutely preclude jurisdiction in this circumstance. Even though the Supreme Court's requirements—fairness to the defendant, and an act purposefully done in the forum state by the defendant—cannot in all cases be compatible with this statute which would confer jurisdiction in every instance when a tort is alleged, it seems that by using the indefinite language of fair play and substantial justice, the Supreme Court has set a vague standard which permits wide discretion in interpretation. If the same criteria which were determinative of the old "doing business" test are now applied to decide the more forthright test of "fairness," no change or improvement is in fact effected. Also it seems reasonable that when a tort is the issue, the nonresident motorist rationale may be broad enough to include a case where a tortious injury is caused in almost any manner.[28] It is respectfully submitted that Mr. Justice Black's argument in the *International Shoe* decision, that the legislature and not the courts should determine when jurisdiction is appropriate, is a convincing one.

Wade H. Creekmore, Jr.

Evidence—Expert Witness—Use of Medical Treatise or Report on Cross-Examination

In a personal injury action the plaintiff's expert medical witness, on cross-examination, disclosed that he had used certain letters and reports, written by his medical associate, in forming his opinion. The cross-examiner sought to introduce the reports into evidence and to question the witness as to the contents of the reports. Upon objection, the trial court refused to allow the introduction of the reports, and prevented further cross-examination concerning the text of the reports. The defendants appealed contending that this ruling was erroneous. Held: Affirmed as to liability; reversed and remanded for trial on the issue of damages. An expert witness may be cross-examined relative to any material which he considers in forming his opinion, and such material may be introduced into evidence if the cross-examiner so desires. *City of Laurel v. Upton*, 175 So. 2d 621 (Miss. 1965).

If treatises and reports are admissible on direct examination for

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[26]Comment, 33 Fordham L. Rev. 671, 679 (1965).

[27]357 U.S. 235 (1958).

[28]Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673, 681 (1957).

their substantive value, there appears to be no objection to their use or introduction on cross-examination.[1] Few jurisdictions admit the materials as substantive evidence, and only Alabama does so pursuant to common law.[2] The other jurisdictions that admit them do so by statute, and then only for limited purposes. South Carolina allows their use on any issue involving poisoning or sanity,[3] while Nevada[4] and Massachusetts[5] authorize their use only against the defendant in a malpractice suit. The Uniform Rules of Evidence advocate the admission of the materials as substantive evidence if the expert witness recognizes the treatise as a reliable authority on the subject.[6] The jurisdictions which refuse to admit the treatises and reports on direct examination generally give as their reasons, the following: there is no opportunity for cross-examination of the author;[7] the sanction of the oath is not present;[8] scientific principles are subject to change and modification;[9] and the technical material may confuse or mislead the jury.[10] Jurisdictions are much more liberal in allowing the use and introduction of these materials on cross-examination than they are on direct.[11] In fact, the United States Supreme Court has held[12] that it is "unfair" to allow the expert to base his opinion on knowledge gathered from books and treatises and then to deny the cross-examiner the opportunity to challenge such evidence by questioning the expert on contrary opinions in other reputable materials. When the materials are admitted on cross-examination, their use, in the great majority of jurisdictions, is restricted to discrediting or testing the qualifications of the expert witness.[13] However, in the jurisdictions previously mentioned that admit the treatises on direct examination as substantive evidence, the materials would also be recognized as substantive evidence on cross-examination.[14] Of the jurisdictions that allow the treatises to be used and introduced on cross-examination, there is a conflict of opinion as to when they will be admitted, but, despite the divergence of opinion, most jurisdictions do allow their use and introduction.[15] On the first level of strictness are

[1]See, *e.g.*, City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Barfield v. South Highland Infirmary, 191 Ala. 553, 68 So. 30 (1915).

[2]See, *e.g.*, Stoudenmeier v. Williamson, 29 Ala. 558 (1857).

[3]S.C. CODE ANN. § 26-142 (1962).

[4]NEV. REV. STAT. § 51-040 (1963).

[5]MASS. ANN. LAWS ch. 233, § 79c (1956).

[6]UNIFORM RULE OF EVIDENCE 63(31).

[7]See, *e.g.*, Landro v. Great No. Ry., 117 Minn. 306, 135 N.W. 991 (1912). See generally 6 WIGMORE, EVIDENCE § 1690 (3d ed. 1940).

[8]See, *e.g.*, Gallagher v. Market St. Ry., 67 Cal. 13, 6 Pac. 869 (1885).

[9]See, *e.g.*, Johnston v. Richmond & D. R.R., 95 Ga. 685, 22 S.E. 694 (1895). See generally 20 AM. JUR. *Evidence* § 966 (1939).

[10]See, *e.g.*, People v. Hall, 48 Mich. 482, 12 N.W. 665 (1882).

[11]See, *e.g.*, Victor American Fuel Co. v. Tomljanovich, 232 Fed. 662 (1st Cir. (1916).

[12]Reilly v. Pinkus, 338 U.S. 269, 275 (1949).

[13]See, *e.g.*, The Atlanta Corp. v. Olesen, 124 F. Supp. 482 (S.D. Cal. 1954).

[14]See, *e.g.*, City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Barfield v. South Highland Infirmary, 191 Ala. 553, 68 So. 30 (1915).

[15]See, *e.g.*, Hastings v. Chrysler Corp., 77 N.Y.S.2d 524 (1948).

the jurisdictions that permit the use and introduction of the materials on cross-examination only if the expert has relied on or cited them as the basis for his opinion.[16] Other jurisdictions admit the materials if the expert states that he either is familiar with or recognizes them as authority.[17] Finally, some jurisdictions admit the materials whether the expert has relied on or even recognized them as authority.[18]

Research reveals that there is a dearth of cases in Mississippi concerning the use and introduction of materials during the questioning of an expert witness. In the case of *Tucker v. Donald*,[19] decided in 1882, an attempt was made to introduce a medical book as substantive evidence to corroborate the testimony of an expert witness. The Mississippi Supreme Court upheld the trial court's denial of its introduction. The supreme court gave as its reasons[20] the standard objections, i.e., the opinion of the author is subject to change; the author is not under oath; and there is no opportunity for cross-examination. In a later Mississippi decision[21] the court said, by way of dictum, that the parties to this particular action could have put an expert on the stand, and that in direct and cross-examination of the expert "commonly recognized" and "customarily" used books "might" be considered. A text[22] on Mississippi evidence states unequivocally that an expert witness may base his opinion on learned treatises and that the opposing side may then cross-examine him thereon. It goes further to say that for the purpose of impeaching the expert, the cross-examiner may introduce the treatises into evidence. This, at first glance, would seem to settle the question in Mississippi, but the authorities given in the text for this general statement are the two cases previously mentioned in this paragraph. It can readily be seen by a perusal of these cases that they are clearly not decisive on this point.

It will be noted that the foregoing discussion has generally related to learned books and treatises, while the principal case is concerned with a report written by the expert witness' medical associate. A correlation can be seen because the mentioned report is in effect a short learned paper. Another reason for the general background materials presented is that the language in the instant case is all inclusive with respect to the materials which could be used and introduced by the cross-examiner if the expert has used them to form his opinion. The court expressed the view that the expert witness could be cross-examined "relative to any matters [i.e., materials] which he used and considered in reaching his findings," and that the cross-examiner could "introduce such matters into evidence if [he] so desired."[23] The language of the principal case would seem to place Mississippi in the category with the other jurisdictions which allow the use and introduction of the materials on cross-examination if the

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[16]See, *e.g.*, Baldwin v. Gaines, 92 Vt. 61, 102 Atl. 338 (1917).

[17]See, *e.g.*, Ruth v. Fenchel, 21 N.J. 171, 121 A.2d 373 (1956).

[18]See, *e.g.*, Oliverius v. Wicks, 107 Neb. 821, 187 N.W. 73 (1922).

[19]60 Miss. 460 (1882).

[20]*Id.* at 470.

[21]Harris v. Pounds, 185 Miss. 688, 187 So. 891 (1939).

[22]McElroy, Mississippi Evidence § 39 (1955).

[23]City of Laurel v. Upton, 175 So. 2d 621, 625 (Miss. 1965).

expert has "used and considered" them in forming his opinion. The decision does not establish whether the materials are to be used solely to discredit or test the expert's qualifications, or if they may be used as substantive evidence. It is submitted that the value of admitting the materials for both purposes far outweighs the disadvantages. The standard disadvantages have been previously alluded to in this note. Among the obvious advantages are:[24] the treatise is a way of getting an unbiased opinion, for the writer is not a partisan expert for either side of the litigation; the author of the treatise would be forced to be impartial and discerning because of the realization that his writing would be under scrutiny by other professionals in the particular field; and the author would have no motive to falsify or misrepresent his opinion because the writing would usually not be drafted with an eye for litigation. It is not submitted that the treatises or reports be admitted to replace the expert, but that their use and introduction be merely supplemental to the expert's testimony. If the expert witness "used and considered" any materials in forming his opinion, those materials should be admitted for the following limited purposes: on direct examination as corroboration of the expert's testimony; on cross-examination to discredit or test the qualifications of the expert; and, on cross-examination as substantive evidence to rebut the expert's testimony. The general rule,[25] that the admission or exclusion of these materials is at the sound discretion of the trial court, would protect this procedure from abuse.

George M. Fleming

Labor Law—Employer's Right to Liquidate His Entire Business Does Not Extend to Partial Closings for Anti-Union Reasons

Respondent corporation operated a textile mill, the majority of the stock of which was controlled by Deering Milliken & Company, which also controlled sixteen other textile manufacturers. The petitioner won a union representation election to which the officers of the corporation reacted adversely by completely liquidating the corporation. The petitioner filed charges against the respondent corporation and Deering Milliken & Company claiming unfair labor practices under section 8(a) of the National Labor Relations Act.[1] The National Labor Relations Board ruled that the respondent corporation together with Deering Milliken & Company constituted a single employer which had committed an unfair labor practice by closing the respondent's plant to avoid unionization.[2] The Court of Appeals for the Fourth Circuit, in denying enforcement of the Board's order, held that, even if the respondent and Deering Milliken had single employer status, an employer had the

[24]See 6 Wigmore, Evidence § 1692 (3d ed. 1940).

[25]See, *e.g.*, Woelfle v. Connecticut Mut. Life Ins. Co., 103 F.2d 417 (8th Cir. 1939). See generally Annot., 60 A.L.R.2d 77, 104 (1958).

[1]National Labor Relations Act (Wagner Act) § 8(a), 49 Stat. 452 (1935), 29 U.S.C. § 158(a) (1964).

[2]Darlington Mfg. Co., 139 N.L.R.B. 241 (1962).

absolute right to close out any or all of his operations regardless of motive.[3] HELD: Reversed and remanded. An employer has the absolute right to terminate his entire business for whatever reason he chooses, but such right does not include the closing of only part of the business to discourage unionization. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

Broad federal control of labor relations dates back to the depression of the 1930's, at which time the need for a new national labor policy was recognized.[4] To correct the gross inequality of the economic bargaining power between the employer and the employee, the result of which would be an improved standard of living and an increased purchasing power on the part of the industrial masses, the National Labor Relations Act, more familiarly known as the Wagner Act, was enacted in 1935.[5] This law granted employees the rights to form or join labor unions, to bargain collectively, and to engage in other concerted activities.[6] To implement and enforce these rights, section 8(a) declared as "unfair labor practices" activities by employers which violated or interfered with these rights. Generally, subdivision 8(a)(1) comprehensively defines an unfair labor practice as an act which would "interfere with, restrain, or coerce employees in the exercise of the rights" guaranteed by section 7. The unfair labor practices defined in subdivisions 8(a)(2), (3), (4), and (5) of this section are species of the generic unfair labor practice defined in subdivision 8(a)(1).[7] Subdivision (2) prohibits the domination or support of a union by an employer. In addition to out-lawing the so-called "company unions," this subdivision imposes on the employer the obligation to avoid participating in the formation, administration, or conduct of a labor union among the employees and to remain neutral in a controversy between competing unions.[8] Subdivision (3) of section 8(a) prohibits discrimination by an employer in respect to the hiring and firing of an employee or employees on the basis of union membership. The area in which discrimination is prohibited includes all elements of the employment relationship in which an employer's discriminaton may be a means of interfering with the guaranteed rights of the employees.[9] Subdivisions (4) and (5) declare it to be an unfair labor practice for an employer to discharge or discriminate against an employee who has asserted his rights under the act or to refuse, under certain conditions, to bargain collectively.

The most frequent violation of the act has been discrimination against employees for union activity, as evidenced by the fact that during the first twelve years of the act's existence two-thirds of all charges filed

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[3]Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 687 (4th Cir. 1963).

[4]MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 19-20 (1950).

[5]See generally COX & BOK, CASES AND MATERIALS ON LABOR LAW 127-130 (5th ed. 1962).

[6]National Labor Relations Act § 7, 49 Stat. 452 (1935), 29 U.S.C. § 157 (1964).

[7]Art Metals Constr. Co. v. NLRB, 110 F.2d 148 (2d Cir. 1940).

[8]NLRB v. Hudson Motor Car Co., 128 F.2d 528 (6th Cir. 1942).

[9]NLRB v. Waterman S.S. Corp., 309 U.S. 206, 218 (1940).

against employers included alleged violations of section 8(a)(3).[10] This discriminatory ban has been interpreted to include not only the discharge of one or more employees,[11] but also mass discharges, such as plant lockouts,[12] shutdowns,[13] removals,[14] and subcontracts,[15] where the effect of such actions is to discourage union membership. Obviously, no problem is presented where the motivation of such actions is wholly to discriminate against union members, but some inconsistency has arisen among the courts concerning the part which the discriminatory intent must play in an employer's action before it will be considered an unfair labor practice. One court held that section 8(a)(3) was violated even if there was a legitimate motive for the employer's action, if only one of the motives is antagonism to unions.[16] One court went so far as to say that acts or statements by an employer hostile to a union may be considered discriminatory where such acts or statements would not be so considered coming from an employer friendly to a union.[17] However, most courts have not been so adamant in their restriction of what is generally considered as management's prerogative to cease operations when a reasonable business justification exists.[18] A reasonable business justification may come into existence with the advent of a union. Most decisions in this area have supported the proposition that the increased costs resulting from unionization of employees is a valid consideration for an employer who decides to close part of his business,[19] and some have even gone farther and indicated that section 8 would not be violated despite the fact that antiunionism was one of the contributing motives to a decision to cease operations.[20] There seems never to have been a decision prior to the instant case which squarely ruled that an employer has the absolute right to go out of business *in toto* for whatever reason the employer chooses, although there have been dicta to that effect.[21] The court in *NLRB v. New Madrid Mfg. Co.*[22] stated that a businessman has the absolute right to permanently close and go out of business for whatever reason he may choose, including union animosity. Such a proposition was accepted by the court of appeals in the instant case in which the court stated that the statute does not compel one to become or remain an employer; for, if the employer ceases his business, he pays the price

[10]MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 78 (1950).

[11]See, *e.g.*, Associated Press v. NLRB, 301 U.S. 103, 123 (1937). See generally Annot., 83 A.L.R.2d 532 (1962).

[12]See NLRB v. Electric Vacuum Cleaner Co., 315 U.S. 685 (1942).

[13]*E.g.*, NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962).

[14]*E.g.*, Reynolds Pallet & Box Co. v. NLRB, 324 F.2d 833 (6th Cir. 1963).

[15]See, *e.g.*, NLRB v. National Food Stores, Inc., 332 F.2d 249 (7th Cir. 1964).

[16]Bon-R Reproductions, Inc. v. NLRB, 309 F.2d 898, 906 (2d Cir. 1962).

[17]NLRB v. Vincennes Steel Corp., 117 F.2d 169 (7th Cir. 1941).

[18]See, *e.g.*, NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960).

[19]*E.g.*, NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 174 (2d Cir. 1961); NLRB v. R. C. Mahon Co., 269 F.2d 44 (6th Cir. 1959).

[20]See NLRB v. Citizens Hotel Co., 326 F.2d 501 (5th Cir. 1964).

[21]See, *e.g.*, NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954).

[22]*Id.* at 914.

for it by foregoing the pursuit of further profit.[23]

Upon consideration of the purpose and background of labor legislation, particularly in light of the tremendous economic power which an employer has relative to that of the employee, it is submitted that the particular result reached by the United States Supreme Court in the instant case is the correct one, despite its superficial inconsistency with the lay ideals of a free enterprise system. This ruling seems to be the only logical result of the judicial interpretation of the labor statute with respect to the facts of the case. For the right of the employer to close part of his operations for anti-union reasons not to have been limited would have been a partial defeat of the purpose of the act, but the Court still managed to refrain from extending the act beyond its intended province. The result of such an extension would have been an intolerable infringement on basic management rights in a free enterprise society. The decision, however, went beyond what was necessary to determine the outcome of the instant case. Extremely broad guidelines were established by which to determine whether an employer closing a business for anti-union reasons occupied such a relationship with other business interests that he could be brought within the ruling of the instant case. According to the Court, for an employer to be brought under this principle, the other business does not have to be "affiliated with or engaged in the same line of commercial activity as the closed plant," so long as it is "realistically foreseeable" that the closing will have an impact on unionization in the other business. It is submitted that this language gives the fact finding National Labor Relations Board far too much latitude in deciding whether an employer has committed an unfair labor practice in a case, such as where an employer who closes his factory for anti-union reasons controls a large portion of stock in another plant engaged in a completely unrelated enterprise, *e.g.*, an owner of a shoe factory who is also a major stockholder in a distant vegetable cannery. Under the principle of this case, the determination of whether or not an unfair labor practice has been committed will depend upon the factual issue of the foreseeable result which the closing of the one factory will have on the union activities in the other plant. This is an issue of fact which, once determined, must be respected by a reviewing court as that of an agency equipped with special knowledge in the field of labor relations and whose findings carry with them the authority of expertness which the Court does not possess.

David R. Hunt

Libel and Slander—Qualified Privilege—Extension to Protect Misstatements of Fact Made Concerning Public Men

Plaintiff, a well-known, controversial figure in matters of national concern, arrived during the night of rioting at the University of Mississippi on September 30, 1962. Defendant newspaper company reported that plaintiff had led a charge of rioters against the United

[23]Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 685 (4th Cir. 1963).

States Marshals who were present at the university campus for the purpose of carrying out orders of the United States courts. Alleging that defendant's statements imputed that he was "participating" in the riot, and that he was a "troublemaker," plaintiff filed suit for libel in the United States district court. HELD: Complaint dismissed. A private citizen who assumes a prominent role in matters of national concern is considered to be a "public man" whose conduct is subject to substantial comment, and is thereby prohibited from collecting damages for defamatory false statements of fact concerning his conduct, provided such statements were made without malice. *Walker v. Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (W.D. Ky., 1965).

For many years the majority rule of the law of libel permitted the recovery of damages for defamatory misstatements of fact, but prohibited recovery for factually based fair comment and criticism of public officials[1] and matters of public concern,[2] provided such comment was made without malice.[3] Some courts extended the privilege to include statements concerning men occupying such positions respecting the public as to subject their conduct to criticism, such as private detectives functioning as policemen.[4] Such a qualified privilege was applied to both statements by newspapers and by members of the public in general.[5] The minority rule extended the qualified privilege to protect misstatements of fact, provided such were made without malice.[6] The leading decision propounding the minority view is *Coleman v. MacLennan*,[7] in which the court held that misstatements of fact concerning a state official were protected by law. By way of dictum, the court stated that the qualified privilege protecting misstatements of fact extended to a great variety of subjects, including public men and matters of public concern.[8] Although the minority rule was often applied to protect defamatory misstatements concerning public officials,[9] no definite indication was given as to how far such statements concerning "public men" would be protected. In 1964 the United States Supreme Court rendered the landmark decision of *New York Times Co. v. Sullivan*,[10] wherein it was decided that the first amendment prohibits a state from awarding damages to a public official who alleges that defamatory misstatements of fact have been made concerning his official conduct, provided such statements were made without malice. It should be noted, however, that Mr. Justice Goldberg, concurring, suggested that false statements concerning public officials should be protected regardless of whether they were made without malice.[11] By adopting the minority

[1]*E.g.*, Cadro v. Plaquemines Gazette, Inc., 202 La. 2, 11 So. 2d 10 (1942).

[2]*E.g.*, Kennedy v. Item Co., 197 La. 1050, 3 So. 2d 175 (1941).

[3]*E.g.*, Tawney v. Simonson, Whitcomb & Hurley Co., 109 Minn. 341, 124 N.W. 229 (1909).

[4]Addington v. Times Publishing Co., 138 La. 731, 70 So. 784 (1916).

[5]*E.g.*, Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E.2d 837 (1943).

[6]See, *e.g.*, Myers v. Longstaff, 14 S.D. 98, 84 N.W. 233 (1900).

[7]78 Kan. 711, 98 Pac. 281 (1908).

[8]*Id.* 98 Pac. at 285.

[9]*E.g.*, Howser v. Pearson, 95 F. Supp. 936, (D.D.C. 1951).

[10]376 U.S. 254, 279-80 (1964).

[11]See *id.* at 305 (Goldberg, J., concurring).

rule in the name of the first amendment, the Court, in effect, nationalized and unified the law of libel.[12] This decision created as many problems as it had solved, and the lower federal and state courts were faced with the decision of how far the new doctrine extended. Some commentators suggested that a further extension of the doctrine to persons other than public officials in their official conduct would be unwarranted.[13] Other commentators contended that the Court, by quoting from the broad language of the *Coleman* decision, had laid the groundwork for broadening the original scope of *Sullivan*.[14] This latter school of thought indicated serious doubts as to how durable a precedent the limitation of the new rule only to public officials would be.[15] Post-*Sullivan* decisions of the courts indicate a division of opinion on the issue. It has been held that the new rule extends to statements made concerning the political complexion of a scientist who strongly advocated a nuclear test-ban treaty,[16] and to statements made concerning the law firm of a candidate for public office.[17] However, statements concerning persons engaged in sports, such as prize fighting,[18] are not protected. Thus, the courts at the present have indicated that the new rule will not be broadened to the extent of the right-of-privacy cases,[19] which have generally held that at least limited scrutiny into the private life of anyone who has achieved the questionable status of a public figure will be permitted.[20]

The Mississippi Supreme Court, prior to the *Sullivan* decision, followed the majority rule, recognizing that factually based comment and criticism of the acts and conduct of public officials are privileged if they are fair and reasonable and made without malice.[21] The qualified privilege also extended to protect comments on matters of public interest.[22] However, statements not based on the truth are not protected, even though they may be made with the best of motives.[23] The Mississippi Supreme Court, through its "quasi-public figure" doctrine,[24] has given a broad interpretation to the scope of persons protected by the qualified privilege. In *Edmonds v. Delta Democrat Publishing Co.*,[25] the court held that the leader of a state-wide committee involved in an issue of general concern had assumed the position of a quasi-public

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[12]Pierce, *The Anatomy of an Historic Decision*, 43 N.C.L. Rev. 315, 341 (1965).

[13]Note, 51 Va. L. Rev. 106, 113 (1965).

[14]39 Tul. L. Rev. 355, 362 (1965).

[15]See Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 Cornell L.Q. 581, 591 (1964).

[16]Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964).

[17]Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (1964).

[18]Dempsey v. Time, Inc., 43 Misc. 2d 754, 252 N.Y.S.2d 186 (1964).

[19]See *id.* 252 N.Y.S.2d at 188.

[20]*E.g.*, Sidis v. F-R Publication Corp., 113 F.2d 806 (2d Cir. 1940).

[21]Oakes v. State, 98 Miss. 80, 96, 54 So. 79, 84 (1910).

[22]See Grantham v. Wilkes, 135 Miss. 777, 100 So. 673 (1924).

[23]Oakes v. State, 98 Miss. 80, 96, 54 So. 79, 84 (1910).

[24]See Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So. 2d 171 (1957).

[25]230 Miss. 583, 93 So. 2d 171 (1957).

figure, and any criticism of his activities made without malice and based upon the truth would be protected by the qualified privilege. The court noted further that the privilege pertains not only to newspapers, but to members of the public in general.[26] The court, in *Henry v. Collins*,[27] reaffirmed its position that criticism must have its foundation in truth before it is protected.

It has been submitted by some authorities that the *Sullivan* rule may do more to encourage unreliable statements than to promote effective and responsible criticism of public officials. However, accepting the *Sullivan* decision as settled law, the question with which the courts will now have to be concerned is whether extensions, such as the one found in the present case, are warranted. Without such an extension, the courts will have created a legal principle which is out of touch with political reality. The policy behind the *Sullivan* decision is that the public should be free to comment, without restraint, on the actions of public officials because of the great influence which they exert on the course of events.[28] Following this line of reasoning, it would be difficult to avoid reaching the conclusion that the new rule should be extended to protect false statements of fact concerning prominent public figures who are not government officials, since in many instances the influence of these "public men" is considerably greater than the influence of public officials. If the average individual is to be able to evaluate intelligently the advice which "public men" may offer on various issues of controversy, such an extension of the new rule as found in the present case is essential. A degree of protection against completely irresponsible statements is still present in the requirement that there be no malice in the otherwise privileged statements. With respect to Mississippi law, any future decision on this question will be guided by the *Sullivan* decision, since that decision was framed in constitutional language, binding on the lower courts. Thus, defamatory false statements of fact concerning public officials must be protected. If the Mississippi court maintains its "quasi-public figure" rule, and combines it with the rule protecting non-malicious false statements concerning public officials, Mississippi will have one of the soundest rules of law of any jurisdiction. In effect, it would be similar to the rule announced in the present case. Realizing that "public men" exert much influence in society, the court could allow their conduct to be thoroughly examined by the public in order for the people to better judge the quality of their advice. Yet, persons who had not obtained a prominent place in the public eye, but who upon occasion make statements concerning public affairs will not be exposed to such discussion. Such a rule, as well as the one announced in the present case, presents a desirable and sound approach to the delicate problem involving the balance between order and liberty.

Frank T. Moore, Jr.

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[26] *Ibid.*

[27] 158 So. 2d 28 (Miss. 1963).

[28] See Note, 51 VA. L. REV. 106, 113 (1965).

Short-Term Trusts—Rental Payments by Grantor—Tax Deduction Allowed

Petitioners, a physician and his wife, owned jointly a building used in his medical practice. On December 31, 1956, they executed an eleven-year trust agreement for the benefit of their four minor children. The instrument named a bank as trustee and conveyed the aforementioned building and the land upon which it was situated to the trust. The trust agreement vested the trustee with "every power and authority over the Trust Estate" that could be had by an absolute owner, and specifically excluded the grantors' right to amend, modify, or revoke the trust. Reversion of the trust corpus following the eleven-year term was to be in the grantors. On January 2, 1957, the bank, as trustee and lessor, leased the building back to the physician for a period of eleven years at a stated annual rental of 1,500 dollars. The lease provided that the lessee maintain and repair the building at his own expense and pay all taxes, utility charges, and costs of alterations to the premises. On April 28, 1959, the physician, by deed recorded, conveyed his reversionary interest in the trust property to his wife. An Ohio Probate Court appointed the wife guardian of the property of her four minor children. The trustee bank filed Fiduciary Income Tax Returns for the years 1959, 1960, and 1961 on behalf of the trust, reporting rent paid according to the lease as gross income. The physician and his wife, in their tax returns for the years 1959, 1960, and 1961, claimed the amount of rent paid the trust as business expense deductions. The Commissioner of Internal Revenue disallowed the claimed rental expense, stating the trust and leaseback arrangements were mere means of assigning family income. Held: Deduction allowed. When a grantor gives business property to a valid, irrevocable trust, having a term in excess of ten years, retaining no control over or reversionary interest in the property and subsequently pays rent to an independent trustee for use of the property in the grantor's business, the rental payments are deductible as ordinary and necessary business expenses under section 162(a)(3), Internal Revenue Code of 1954. *Alden B. Oakes,* 44 T.C. No. 48 (July 6, 1965).

Short-term trusts, known as "Clifford" trusts, have consistently been employed as a means of lessening income tax demands upon middle to high income bracket families.[1] It is a "respectable" means of avoiding income taxes.[2] Clifford trusts are taxwise methods of providing support for needy relatives and accumulating funds for the benefit of children.[3] Decisional history of short-term trusts began with *Helvering v. Clifford,*[4] which gave the short-term trust its common name and necessitated the "Clifford regulations" in the years following the decision. Sections 671-78, Internal Revenue Code of 1954 are generally a codification of the

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[1] Froehlich *Clifford Trusts: Use of Partnership Interests as Corpus; Leaseback Arrangements,* 52 Calif. L. Rev. 956 (1964).

[2] Yohlin, *The Short-Term Trust—A Respectable Tax-Saving Device,* 14 Tax L. Rev. 109 (1958).

[3] Alexander, *The Short Term Trust,* 31 Miss. L.J. 261, 266 (1960).

[4] 309 U.S. 331 (1940).

Clifford regulations with minor changes and simplifications.[5] In the namesake case, the Supreme Court held income of a five-year trust taxable to the grantor under the definition of income in the Internal Revenue Code of 1939[6] by reason of: (1) the relatively short period before reversion of the corpus to the grantor; (2) power of the grantor to control beneficial enjoyment; and, (3) administrative powers of the grantor.[7] The Court's failure to outline the essential elements of a valid short-term trust for tax-savings led to the necessity of administrative definition and later embodiment in the Internal Revenue Code of 1954. The Clifford sections of the 1954 Code evoke comments ranging from general optimism and confidence in the safety of the use of the short-term trust,[8] to recommendations that the trust be used in some instances only when the grantor is in a safe position to make a complete gift of the corpus,[9] and to an extreme caution as to the dangers of vague statutory provisions in the Clifford sections and the often conflicting court decisions.[10] Two kinds of non-charitable short-term trusts are validated by the 1954 Code: (1) trusts for the life of the beneficiary; and, (2) ten-year trusts.[11] The life trust is an effective and useful way of providing for a dependent relative or retired employee.[12] Income from a ten-year trust may be used to finance the future education of a child, but technicalities must be observed in drafting and administering such a trust, for the income could be taxable under section 677(a)[13] to the person legally obligated to support the beneficiary.[14] A legal obligation is defined by local rather than federal law.[15] Multiple trusts naming the same beneficiary are liable to taxation as one trust,[16] resulting in a high tax rate. Dangers in the transfer of an income interest include the possible disregard of the trust for tax purposes and labeling the transaction as simply an assignment of income.[17] Powers of the grantor over the trust corpus or the income must be limited if the trust is to effect a tax saving.[18] The general rule has been stated to be that the flexibility of the trust is directly related to the independence of the trustee.[19] The flexibility of the trust so far as the grantor may wish to sprinkle among

[5]Johnson, *Trusts and the Grantor,* 36 TAXES 869, 871 (1958).

[6]Int. Rev. Code of 1939, ch. 1, § 22(a), 53 Stat. 9.

[7]Helvering v. Clifford, 309 U.S. 331, 335 (1940).

[8]Yohlin, *The Short-Term Trust—A Respectable Tax-Saving Device,* 14 TAX L. REV. 109, 110 (1958).

[9]Froehlich, *Clifford Trusts: Use of Partnership Interests as Corpus; Leaseback Arrangements,* 52 CALIF. L. REV. 956 (1964).

[10]Comment, 38 N.Y.U.L. REV. 740, 751 (1963).

[11]INT. REV. CODE OF 1954, § 673.

[12]Johnson, *Trusts and the Grantor,* 36 TAXES 869, 871 (1958).

[13]INT. REV. CODE OF 1954, § 677(a).

[14]Yohlin, *The Short-Term Trust—A Respectable Tax-Saving Device,* 14 TAX L. REV. 109, 120 (1958).

[15]Treas. Reg. § 1.662(a)-4 (1956).

[16]Boyce v. United States, 190 F. Supp. 950 (W.D. La 1961).

[17]Helvering v. Horst, 311 U.S. 112, 119-20 (1940).

[18]INT. REV. CODE OF 1954, § 674.

[19]Yohlin, *The Short-Term Trust—A Respectable Tax-Saving Device,* 14 TAX L. REV. 109, 124 (1958).

beneficiaries, to accumulate income, or to distribute income will depend upon whether the trustee is a completely independent party, the grantor himself, or a relation of the grantor.[20] The grantor cannot retain certain administrative powers over the corpus,[21] and the trust must be irrevocable for at least ten years.[22] Violation of any of the general principles outlined above will place the grantor in the position of a substantial owner and make him liable for tax on income of the trust.[23]

If the asset to be used as the corpus of the trust is one currently employed in the grantor's business or profession, the plan must provide for a tranfer of the asset to the trustee and a leaseback to the grantor. Payments made by the business for the lease or use of the asset must be deducted as business s expenses or the trust plan will have lost its value—tax savings. The legislative fly in the fiduciary ointment, at the point where all the provisions of the Clifford sections have been carefully followed, is that the question of deductibility of such payments is not finally settled.[24] The regulations,[25] backed by legislative history,[26] determine that the Clifford sections have no effect upon the right of the grantor to deduct payments to a trust where a transfer and leaseback plan has been completed. Compliance with the 1954 Code is therefore irrelevant to the deduction issue, and the grantor is left with only case law upon which to base his claims for deductions of rent paid to short-term trusts.[27] The Commissioner's argument in these cases usually employs the contention that the leaseback rentals are not "ordinary and necessary"[28] in accordance with section 162(a),[29] for the transaction was without business purpose and therefore a tax-avoiding sham.[30] In denying deductions, the Court of Appeals for the Fifth Circuit in the recent *Van Zandt* case[31] held that in reality the family trust in question was a "funnel" of income to children. The Third and Seventh Circuit Courts have held, in cases where the grantor retained neither a power of revocation nor a reversionary interest, that deductions for leasebacks were valid.[32] Tax Court cases following those decisions have reached similar results.[33] Where reversion after the term of the trust was to the

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[20]INT. REV. CODE OF 1954, § 674. See generally Treas. Reg. § 1.674 (1956).

[21]INT. REV. CODE OF 1954, § 675.

[22]INT. REV. CODE OF 1954, § 676.

[23]INT. REV. CODE OF 1954, § 671.

[24]Froehlich, *Clifford Trusts: Use of Partnership Interests as Corpus; Leaseback Arrangements,* 52 CALIF. L. REV. 956, 968 (1964).

[25]Treas. Reg. § 1.671-1(c) (1956).

[26]U.S. CODE CONG. & AD. NEWS, 83d Cong. 2d Sess. No. 3, p. 5006.

[27]Froehlich, *Clifford Trusts: Use of Partnership Interests as Corpus; Leaseback Arrangements,* 52 CALIF. L. REV. 956, 968 (1964).

[28]Van Zandt v. Commissioner, 341 F.2d 440 (5th Cir. 1965).

[29]INT. REV. CODE OF 1954, § 162(a).

[30]*E.g.,* Finley v. Commissioner, 255 F.2d 128 (10th Cir. 1958).

[31]Van Zandt v. Commissioner, 341 F.2d 440, 444 (5th Cir. 1965).

[32]Brown v. Commissioner, 180 F.2d 926 (3d Cir. 1950); Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948).

[33]John T. Potter, 27 T.C. 200, 215 (1956); Albert T. Felix, 21 T.C. 794, 804 (1954).

grantor, the deduction was disallowed.[34] In addition, the transaction has been termed merely an assignment of family income.[35] In *Van Zandt*, the court had little to say about the reversionary interest of the grantor, but gave the lack of an independent trustee coupled with an obvious absence of business purpose as being the principal reasons for denying deductions.[36] In the leading cases, *Skemp*[37] and *Brown*,[38] independent trustees were used, and grantors were allowed the deductions. Deductions have been denied on the alternative point of a retention of equity by the grantor in the trust property.[39] Denial of deductions on the equity basis stems from section 162(a)(3)[40] where it is pointed out that a deduction cannot be taken for rent paid on property in which an equity is retained by the lessee.

It is submitted that disallowing deductions on the basis of retained equity in the grantor would cause greater confusion in tax law. If the word "equity" in the statute were so construed, the rule would preclude deductions for rent payments on property on which the lessee holds an option, for example, rental paid by the lessor of a large department store for the shoe concession. Remaindermen would be precluded from renting from the life tenant. Such a rule would be unrealistic. Corporations are not organized to make gifts. An individual, however, may be motivated by many forces other than the profit motive. The statutes outline the essentials of short-term trusts and place no ban upon gifts to trusts of a business asset. Therefore, the concern about business purpose seems hardly appropriate to the question of whether rent payments to the trust are deductible. The transaction should be viewed only from the time the obligation to pay rent is incurred. Obviously, there may be no business purpose in transferring property to a trustee, but there are no restrictions upon individuals to prevent such transfers. Rent paid subsequently for use of the property becomes as ordinary and necessary as though the grantor had never been owner. The case law indicates that to permit deductions, the trustee must be someone other than the donor, although the Clifford sections of the code mainly lay the rule for a grantor acting as his own trustee. Further, the degree of independence seems to have little bearing, since in *Brown*[41] the trustee was the grantor's attorney. In *John T. Potter*,[42] one of the trustees was the grantor's accountant. However, the safest course, as is indicated by the instant case, is to use as independent a trustee as is possible. It is also advisable to avoid any appearance of a pre-arranged leaseback. Such purpose can be accomplished with greater ease if a trust institution acts as trustee. The Tax Court in the noted case reached the best decision, emphasizing care taken by the taxpayer to appoint a completely independent trustee

[34]Hall v. United States, 208 F. Supp. 584 (N.D.N.Y. 1962).

[35]*Ibid.*

[36]Van Zandt v. Commissioner, 341 F.2d 440 (5th Cir. 1965).

[37]Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948).

[38]Brown v. Commissioner, 180 F.2d 926 (3d Cir. 1950).

[39]Kirschenmann v. Westover, 225 F.2d 69 (9th Cir. 1955); Hall v. United States, 208 F. Supp. 584 (N.D.N.Y. 1962).

[40]INT. REV. CODE OF 1954, § 162(a)(3).

[41]Brown v. Commissioner, 180 F.2d 926 (3d Cir. 1950).

[42]27 T.C. 200 (1956).

and placing considerable weight upon the fact that the grantor had divested himself of any future interest in the property. It should be noted that even though the Tax Court in the instant case stressed the importance of relinquishing a future interest, the return in question was jointly filed with the wife, actually one of the petitioners and holder of the reversion. The release of the reversionary interest was not used to validate, but only to support, the bona fide intent of the transfer.

George Harold Noe

TAXATION—BASIS OF PROPERTY ACQUIRED FROM A DECEDENT

Husband and wife executed a joint will in 1932, whereby the husband devised and bequeathed a life estate in all his property to his wife "with power to spend or negotiate or sell any and all of said property as she may see fit without accounting to anyone therefor." The remainder, if any, was to go to named remaindermen. The husband died in 1933, and the will was probated as his will. Between the time of her husband's death and her death in 1957, the wife took no affirmative action in regard to her power of disposition. Upon her death the same instrument was probated as her will. The claimant bank, duly qualified as executor, liquidated the estate and reported the proceeds as income to the widow's estate, the profit being determined by the difference between the sales price and the market value at the husband's death. After having paid income taxes on the proceeds, the claimant bank filed a claim for refund on the contention that the wife exercised the power of appointment by her will. Thus, the claimant bank contended that the proceeds were properly includable in the wife's estate and only estate taxes were payable. The lower court upheld this contention and ruled for the taxpayer. HELD: Reversed and remanded. Life tenant's power to spend, negotiate, or sell was not capable of being exercised by will, and the basis of the property, not being properly includable in the life tenant's estate, was the fair market value at the donor's death. *United States v. Bank of Clarksdale*, 346 F.2d 638 (5th Cir. 1965).

For purposes of the federal income tax, the general rule pertaining to property acquired from a decedent is that the basis shall be the fair market value at the decedent's death.[1] However, if the alternate valuation date[2] is used in the estate tax return, the basis of the property will be the market value at such date. Thus, the basis for property acquired from a decedent for federal income tax purposes is the same as the valuation placed upon property for federal estate tax purposes.[3] Therefore, the question, under estate tax law, of which estate should include the property involved becomes of the utmost importance, and the answer to this question will fix the basis for gain or loss when the

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[1]INT. REV. CODE OF 1954, § 1014.

[2]INT. REV. CODE OF 1954, § 2032.

[3]Treas. Reg. § 1.1014-1 (1957), as amended, T.D. 6527, 1961-1 CUM. BULL. 153.

property is sold or transferred. One of the areas in which difficulty has arisen is where a general power of appointment has been created on or before October 21, 1942.[4] Section 2041 of the Internal Revenue Code of 1954 defines a general power of appointment as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate."[5] Whenever a power coming within this definition is exercised, the property subject to the power is includable in the estate of the holder of the power, but "the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof."[6] When there is doubt as to whether a power has been exercised, the law of the state in which the will is to operate is controlling.[7] However, for purposes of section 2041, the power must have been exercised either (1) by will, or (2) by a disposition of such a nature that the property would have been includable in the decedent's estate by virtue of a transfer in contemplation of death,[8] a transfer with a retained life estate,[9] a transfer taking effect at death,[10] or a revocable transfer.[11]

Hill v. Godwin[12] set forth the rule that a joint will is a valid separate will of each testator only as to the property of each testator to be distributed according to his declared intentions. In following this decision, the Supreme Court of Mississippi construed the will concerned in the present case as giving the wife only a life estate with a vested interest in the remaindermen, and held that the property disposed of by the joint will was the husband's.[13] The supreme court also stated that the wife had not exercised her power of disposition.[14] It has been said, though, that as long as the holder of a power of appointment lives, the remaindermen have only a vested interest subject to divestment.[15] It is by reason of the death of the holder without exercising the power adverse to the remaindermen that their estate becomes indefeasible, and this is "the generating source of the change," and also "the generating source of the tax."[16] The question arises, though, as to when a power of disposition can be exercised by will. Generally, where the mode of execution of a power is not specified, the power may be exercised either by deed or will.[17] However, where the mode of execution is prescribed, the power cannot be exercised by any

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[4]*Compare* INT. REV. CODE OF 1954, § 2041(a)(1), *with* INT. REV. CODE OF 1954, § 2041(a)(2).

[5]INT. REV. CODE OF 1954, § 2041(b)(1).

[6]INT. REV. CODE OF 1954 § 2041(a)(1)(B).

[7]Helvering v. Stuart, 317 U.S. 154, 161 (1942).

[8]INT. REV. CODE OF 1954, § 2035.

[9]INT. REV. CODE OF 1954, § 2036.

[10]INT. REV. CODE OF 1954, § 2037.

[11]INT. REV. CODE OF 1954, § 2038.

[12]120 Miss. 83, 81 So. 790 (1919).

[13]McClelland v. Bank of Clarksdale, 238 Miss. 557, 119 So. 2d 262 (1960).

[14]*Id.* at 569.

[15]Wear v. Commissioner, 65 F.2d 665 (3d Cir. 1933).

[16]*Ibid.*

[17]O'Hara v. O'Hara, 185 Md. 321, 44 A.2d 813 (1945).

other mode.[18] Where a will creates a life estate with a power of sale or disposition and a remainder of "whatever remains" or some equivalent phrase, the general rule is that the life tenant is restricted to exercising the power during his lifetime for his own use, thus excluding any testamentary disposition thereof.[19] The life tenant is entitled to the full possession, control, and management of the property during his life, with power to dispose of it as his needs and judgment dictate.[20] However, the power must be exercised in good faith, and not for the purpose of defrauding the remaindermen.[21] In *Selig v. Trost*,[22] the power to mortgage or sell property with a perfect title thereto with the residue left to named takers was held to be an inter vivos power only, and the property could not be disposed of by will. Therefore, since the law of the state where the will is to operate controls the passing of title for both property and tax laws,[23] the United States Court of Appeals for the Fifth Circuit in the instant case decided and based its decision upon the decision of the Mississippi Supreme Court in the *Selig* case.

An important factor to be considered in the drafting of a will is the effect that taxes will have upon an estate. The instant case gives an excellent illustration of the problems that can and do arise from the application of federal tax statutes and illustrates the necessity of careful planning in the drafting of a will. There are many tax advantages to be had today, if, and only if, the draftsman uses sound planning in the disposition of an estate. Notice should be taken, however, that there is still in existence today a number of wills which present the same problems as those encountered in the instant case. Therefore, some form of action should be considered which will relieve an executor or remainderman from the burden of excessive income taxes upon the estate. Such action may take a variety of forms, as the ingenuity of counsel may uncover in his analysis of the problem. It is possible that the life tenant and the remainderman may reach some agreement which may either postpone the tax or, in some instances, result in its diminution or total elimination. At any rate such situations call for the attention and best effort of the lawyer and tax advisor to the end that there be no unnecessarily burdensome tax imposed. The fact that the court in the instant case held adversely to the taxpayer should not take anything away from the very able argument made in the taxpayer's behalf, but should point out the difficulty of the problem encountered.

William B. Harvey

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[18] *Ibid.*

[19] *E.g.*, Moore v. Morris, 258 S.W.2d 908 (Ky. 1953); Annot., 2 A.L.R. 1243, 1297 (1919).

[20] *E.g.*, Belford v. Olson, 94 N.H. 278, 51 A.2d 635 (1947).

[21] *E.g.*, Waybright v. Longstreet, 221 Ind. 251, 46 N.E.2d 683 (1943).

[22] 110 Miss. 584, 70 So. 699 (1916).

[23] Helvering v. Stuart, 317 U.S. 154, 161 (1942).

TORTS—CAUSE OF ACTION FOR NON-PHYSICAL INJURY INFLICTED AT CONCEPTION

It was alleged that plaintiff's mother, while a patient in a state mental institution, was carnally assaulted, as a result of which the plaintiff was conceived and born out of wedlock to a mentally deficient mother. The plaintiff, an infant, brought this action against the state claiming that the damages arising from her illegitimate birth were caused by the state's negligence in failing to protect the mother from physical harm. The state moved to dismiss the complaint for lack of a cause of action. HELD: Motion denied. An infant born out of wedlock as a result of the state's negligence has a justifiable cause of action, even though the tort occurred at conception. *Williams v. State,* 260 N.Y.S.2d 953 (Ct. Cl. 1965).

The legal status of infants *en ventre sa mere* has given rise to what is possibly the area of greatest divergence between the field of torts and other legal disciplines, such as contracts, property, and trusts. Whether or not to recognize the existence of such an infant became a judicial problem at least as early as 1586,[1] when the Court of King's Bench stated that the law did recognize the unborn infant through the expectation of its birth. The earliest cases concerning this problem arose in the field of property,[2] wherein the judges were concerned with whether or not a devise to an infant *en ventre sa mere* would be an abeyance of a freehold estate. In *Beale v. Beale,*[3] Lord Chancellor Harcourt first expressed the idea that an estate should be allowed to vest in the uterine infant when such a holding would be for the benefit of the child. This idea was to be heavily relied upon later.[4] Despite these rulings, it was not absolutely fixed in the common law until 1798 that such a child was "living" within the terms of a will specifying living heirs.[5] This approach of allowing estates to vest in unborn infants was adopted in the early cases in the United States to the extent of allowing such infants to take whether by devise[6] or under the statutes of distribution,[7] provided that the infant was later born alive. This recognition of the rights of unborn infants became so accepted[8] that it was inevitable that the influence would be felt in other areas of the law. In the field of contracts the infant emerged as a third party beneficiary to contracts made while the child was yet unborn.[9] The Massachusetts court ruled in 1914[10] that, generally, one cannot recover under a contract to which

[1]Earl of Bedford's Case, 7 Co. Rep. 7b, 77 Eng. Rep. 421 (K.B. 1586).

[2]*E.g.*, Scatterwood v. Edge, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1698).

[3]1 P. Wms. 244, 24 Eng. Rep. 373 (Ch. 1713).

[4]*E.g.*, Steadfast *ex dem.* Nicoll v. Nicoll, 3 Johns. Cas. 18 (N.Y. Sup. Ct. 1802); *In re* Haines' Will, 98 N.J. Eq. 628, 129 Atl. 867 (1925); Burdet v. Hopegood, 1 P. Wms. 486, 24 Eng. Rep. 484 (Ch. 1718).

[5]*Compare* Musgrave v. Parry, 2 Vern. 710, 23 Eng. Rep. 1067 (Ch. 1715), *with* Thellusson v. Woodford, 4 Ves. Jun. 227, 31 Eng. Rep. 117 (Ch. 1798).

[6]Hall v. Hancock, 32 Mass. (15 Pick.) 255, 26 Am. Dec. 598 (1834).

[7]Harper v. Archer, 12 Miss. (4 S. & M.) 99 (1845).

[8]*E.g.*, McArthur v. Scott, 113 U.S. 340, 379 (1884).

[9]French v. French, 161 Kan. 327, 167 P.2d 305 (1946).

[10]Gardner v. Denison, 217 Mass. 492, 105 N.E. 359 (1914).

he is not a party but that the exigencies intrinsic in naming a child are such that the infant should be able to bring suit in his own name. California later enforced this theory by stating that recovery under such a contract was "indisputable."[11] Similarly, it is generally accepted that a trust can be created for the benefit of an unborn infant, even prior to its conception, if the interest of the trust will vest within the time of the rule against perpetuities.[12] In this regard, it has been held that an infant *en ventre sa mere* is a life in being within the specifications of the rule.[13]

Judicial acceptance of the legal status of infants *en ventre sa mere* has not been so readily extended in the field of torts, however. The earliest United States case to gain attention was *Dietrich v. Inhabitants of Northampton*,[14] in which the Massachusetts Supreme Court, through Mr. Justice Holmes, ruled that an infant *en ventre sa mere* was a part of its mother and that, therefore, no distinct, separate injury could be attributed to it. Consequently, the court ruled, since the child was a part of its mother, it could not be a person within the meaning of the wrongful death statute.[15] Recovery has also been denied for such reasons as lack of precedent,[16] no duty owed to the unborn child,[17] the possibility of false claims,[18] and the speculatory nature of the damages arising from such injuries.[19] The ultimate effect of these rulings was summed up in an unequivocal statement in the *Restatement of Torts* that "a person who negligently causes harm to an unborn child is not liable to such child for the harm."[20] These cases have not been without dissenters, however. Dissenting in *Allaire v. St. Luke's Hosp.*,[21] Justice Boggs set the basis for later recoveries by concluding that a uterine infant should not be denied recovery simply on the basis of lack of precedent. In support of this conclusion he cited[22] Judge Cooley's argument[23] that a principle applied for the first time was presumed to have always existed at common law and was not enunciated earlier because no cause required its application. Justice Boggs also commented upon the fact that the infant had reached the point of viability in fetal development—a condition much relied upon as a test for recovery for many years, and one which is still relied upon in at least twenty states.[24] The first United States case to allow

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[11]Schumm v. Berg, 37 Cal. 2d 174, 231 P.2d 39, 43 (1951).

[12]See RESTATEMENT, TRUSTS § 112, comment *d* (1935).

[13]Phillips v. Herron, 55 Ohio St. 478, 45 N.E. 720 (1896).

[14]138 Mass. 14 (1884).

[15]*Id.* at 17.

[16]*E.g.*, Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900).

[17]*E.g.*, Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

[18]*E.g.*, Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).

[19]*E.g.*, Stanford v. St. Louis-S.F. Ry., 214 Ala. 611, 108 So. 566 (1926).

[20]RESTATEMENT, TORTS § 869 (1939).

[21]184 Ill. 359, 56 N.E. 638, 640 (1900) (Boggs, J., dissenting).

[22]*Id.* 56 N.E. at 641.

[23]COOLEY, TORTS § 10, at 17 (4th ed. 1932).

[24]For a complete listing of cases see Hay, *The Law of Prenatal Injuries*, 37 U. COLO. L. REV. 279 n.52 (1965).

recovery for physical prenatal injuries was *Bonbrest v. Kotz*,[25] in which the court ruled that the absence of precedent should afford no protection to those who invade the rights of others by wrongful acts. The court disposed of the inseparability of mother and infant argument by acknowledging that the infant becomes an independent human being at conception.[26] Following the lead of the *Bonbrest* court, twenty-three states and the District of Columbia have extended a cause of action either to infants or to their administrators.[27] The Mississippi Supreme Court established, by way of inference, the right of an infant *en ventre sa mere* at the time of injury to bring an action for damages by allowing the administrator of such an infant to bring suit under Mississippi's wrongful death statute, expressly limiting the rule to cases in which the infant was viable at the time of injury.[28] Advances in medical sciences[29] have led at least four states to accept the contention that an unborn child not viable at the time of injury should be extended the opportunity to put its case before the court, if later born alive.[30] In an action by an infant injured during the third month of fetal development, the New York Supreme Court said by way of dictum that the plaintiff would have had a cause of action for his injuries regardless of the state of advancement of the fetal development, stating further that legal separability should begin with biological separability which occurs at conception.[31] In *Zepeda v. Zepeda*,[32] the Appellate Court of Illinois was faced with a complaint of injuries almost identical to those of the instant case. In this suit by an adulterine bastard against his putative father, the Illinois court acknowledged the hesitancy of the law of torts to keep abreast of medical science and admitted that a tort—not physical in nature—had been committed upon the plaintiff simultaneously with his conception. The *Zepeda* court also ventured to state that wrongful conduct prior to conception could render the actor liable to the infant later.[33] In denying the child a cause of action, the court held that the interests of society were so involved and that the action needed to redress the wrong was so far-reaching that the policy of the state should be declared by the legislature.[34] Two state legislatures have specifically set the policy of their respective states by passing statutes granting unborn infants the same legal status as persons already born.[35]

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[25]65 F. Supp. 138 (D.D.C. 1946).

[26]*Id.* at 140.

[27]For a complete listing of cases see Hay, *The Law of Prenatal Injuries*, 37 U. COLO. L. REV. 272 n.6 (1965).

[28]Rainey v. Horn, 221 Miss. 269, 283, 72 So. 2d 434, 440 (1954).

[29]For a comprehensive discussion of the effects of developments in medical science upon the issue of prenatal injuries see Note, 110 U. PA. L. REV. 554 (1962).

[30]Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Sana v. Brown, 35 Ill. App. 2d 425, 183 N.E.2d 187 (1962); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Kelley v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

[31]Kelley v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

[32]41 Ill. App. 2d 240, 190 N.E.2d 849, 855 (1963).

[33]*Ibid.*

[34]*Id.* 190 N.E.2d at 859.

[35]CAL. CIV. CODE § 29; LA. CIV. CODE ANN. art. 29 (West 1952).

The enactment of statutes in these two states giving *locus standi* to unborn infants is significant in that these legislatures have bridged a hiatus in the common law which apparently resulted from a general lack of understanding of the medical processes in fetal development. It is ironic that the legal fiction created in the early property cases, that the infant *en ventre sa mere* was a "person" within the contemplation of the law, should be an actuality which is now recognized by both the law and medical science. The court in the instant case admonishes that the realities of the situation should be faced, which can only mean that the disparity between the various fields of law with regard to uterine infants should now be eternally reconciled. If an estate is allowed to vest in an unborn infant and contracts can be entered into on its behalf, for the breach of which it can recover damages, why should any barrier be placed before it which would prevent a recovery for a tortious injury—physical or otherwise? Juristic attitudes have broadened with the advancement of knowledge in medical science; but the timidity of the courts, spawned by a lingering fear of fictitious claims, speculatory damages, and opening the flood-gates of litigation, must be put aside and the realization reached that infants *en ventre sa mere* should be included within the scope of the ideal which gives to all persons the right to enter into a court to seek an alleviation of their damages.

Jesse Murray Akers

RECENT BOOKS

FUTURE INTERESTS AND ESTATE PLANNING. William Schwartz. Indianapolis: The Bobbs-Merrill Company, Inc., 1965. Pp. 512. $15.00.

Admittedly, the body of law with which this book deals is a bit complicated and well provided with traps or pitfalls for the unwary. Not infrequently, students enter this field of study with misgivings and leave it with uncertainty, retaining a vivid impression that future interests and estate planning constitute a "cat-and-mouse" game which feeds on destruction and frustration, and which can best be put out of mind in hope of forgetting about it. After law school, the prospect of a job in estate planning may well conjure up haunting memories of the weird refinements and doctrines of *Purefoy v. Rogers*,[1] *Festing v. Allen*,[2] *Jee v. Audley*,[3] *Leake v. Robinson*,[4] *et cetera, et alii,* and *inter alia,* for the lawyer in question. He thinks in terms of an extended refreshing of his knowledge, through long-winded and complicated tomes of legal learning, only to rediscover the basic archaic rules which are still so prevalent. Often, it appears too monumental for undertaking, so the lawyer takes a deep breath and decides to turn a fine client over to another practitioner who bears the reputation of "being up" on future interests and estate planning.

Fortunately, times may be better for the lawyer in such a situation, since Professor William Schwartz has come forward with his medium-sized volume. While classified as a "Student Edition," it has great utilitarian potential for both the student and the practicing lawyer. As a general pattern, the author heads a section with a bold-faced statement of the doctrine (rule or proposition) involved, follows it with a brief explanation or "verbalizing," and then sets out very useful examples of practical application. There is little analyzing of the authorities or source materials, but this book is, as a casual example will reflect, replete with citations for the appropriate authorities and source materials. In this respect, this book is particularly convenient for the busy practitioner.

The volume deals with destructibility of contingent remainders, indefinite failure of issue, inalienability of such tag-ends of ownership as possibility of reverter and right of entry, prospect of forfeiture of such tag-ends by attempted voluntary transfer, the nonsense of worthier title, the all-or-nothing rule in respect to contingent class gifts, the fantacies of the unborn widow and of the precocious toddler, and various other pesky gnat-picking common law doctrines and concepts which frustrate the draftsman and defeat his intentions and objectives. Professor Schwartz does not purport to give exhaustive treatment, but his liberal citations and other footnotes point to the sources for thorough research and consideration.

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[1] 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (K.B. 1670).

[2] 12 M.&W. 279, 152 Eng. Rep. 1204 (Ex. 1843).

[3] 1 Cox. 324, 29 Eng. Rep. 1186 (Ch. 1787).

[4] 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817).

On the other side, he calls attention to various developments designed to mollify or avoid the well established proposition that destruction and ruin are the compulsive objectives of the Rule Against Perpetuities. Wait-and-see, Cy pres (and equitable approximation), capture, marshalling (i.e. allocation), sub-classes in class gifts, and the rule of convenience are doctrines or constructions which tend to direct more attention to the intentions and expectations of the testator or settlor. While these relate, for the most part, to interpretation and administration, their presentation and explanation in handy form would tend to make the draftsman more aware of the various booby-traps which may be created by inadvertence or oversight. These aids are adequately set forth by the author.

Professor Schwartz also points out that, in various instances, piecemeal legislation may not always accomplish the result which would have been appropriate. For example, he calls attention[5] to the fact that some jurisdictions of this country have undertaken to abrogate the destructibility rule as applied to contingent remainders at common law, but have in point of fact omitted to extend the legislation to the situation where the prior particular estate of freehold (life estate) terminates by death before the remainder has vested. He correctly includes Mississippi as one of the situations in point. For more than one hundred and twenty-five years, the statutes of Mississippi have provided:

> . . . nor shall the alienation of any particular estate on which a remainder may depend, whether such alienation be by will or other writing, nor the union of such particular estate with the inheritance, by purchase or by descent, so operate, by merger or otherwise as to defeat, impair, or in any way affect such remainder.[6]

In *Irvine v. Newlin*,[7] a testator died in 1850, devising his widow a life estate in his reality, and further devising by the third clause of his will, one-third of his realty "unto the heirs of Elinor Crabtree." The widow predeceased Elinor Crabtree and the nine children of Elinor Crabtree. The Supreme Court of Mississippi refused to give effect to the devise "unto the heirs of Elinor Crabtree," on the ground that

> . . . as Elinor Crabtree was alive at the termination of the life estate . . . , and being alive had no heirs, no estate vested by virtue of said third clause, which failed for want of persons to take according to its terms.[8]

Unfortunately, the above mentioned case is indexed and discussed under "Wills" in the Mississippi Digest. Therefore, the case is not readily found if one has forgotten its style.

The author also offers a worthwhile exposition and explanation of other aspects of statutory reform, which are in varying degree and extent. About half of the states have undertaken the job, so that this volume may

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[5] SCHWARTZ, FUTURE INTERESTS AND ESTATE PLANNING 32 (1965).

[6] MISS. CODE ANN. § 839 (1956).

[7] 63 Miss. 192 (1885).

[8] *Id.* at 197.

be a convenient starting point for finding where a particular state stands in that respect. In addition to all else, this book contains a very helpful blending of the pertinent tax statutes which have importance in estate planning. The tax features seem to have been brought right down to Revenue Procedure 64-19, for "halving" in connection with marital deduction trusts.

It is not suggested that this little book contains all the solutions to the problems of future interests and estate planning. It does afford a starting point in respect to them. It is hardly necessary to observe that no planner or draftsman in this area starts out with the intention of deliberately setting up interests which are in violation of the applicable rules. Many, if not most, defective provisions result from oversight or forgetfulness as to the existence of some highly technical (or even weird) doctrines or rules involved. A lawyer should not forget that the running of the period of the Rule Against Perpetuities starts at the death of a testator in case of a will, but starts at the delivery of the instrument and creation of the interests in case of a deed or inter vivos trust. Nevertheless, craftsmen (even some of the best and most skilled) in this area of endeavor do sometimes "slip up," and do have lapses of memory as to the intricacies. It is true that the objectives of the settlor or testator are being accorded greater consideration by the courts (and the legislatures) in contrast to the rigid application of the remorseless rule of destructibility. That general tendency does not save the professional from his oversights. The undersigned believes that Professor Schwartz's volume will be of considerable help—in avoidance.

Roscoe Cross
Professor of Law
University of Mississippi

BOOK NOTES

CONFLICT OF LAWS. Edward S. Stimson. Buffalo, New York: Dennis & Co., Inc. 1963. Pp. 505. $10.00.

In this textbook the author emphasizes the basic problems, and the principles for their solution, in the area of conflict of laws. The book is divided into three main parts: Ascertaining the Applicable Law; Jurisdiction of Courts; and Foreign Judgments. There are twenty chapters, which deal with such subjects as diversity cases in federal courts, procedure, transfers of title, taxation, corporations, partnerships, real estate, personal property, and bases of jurisdiction. The author is professor of law at the University of Idaho College of Law, and is also the author of a casebook on this subject.

ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION. John L. Carey and William O. Doherty. New York, New York: American Institute of Certified Public Accountants. 1966. Pp. 330. $5.00 ($4.00 to members).

This book is a detailed revision of John L. Carey's *Professional Ethics of Certified Public Accountants*, published in 1956. The authors, who are staff members of the publisher, felt that a revision was necessary because of the many changes that have been effected in the profession's rules in the past ten years. The book deals with such topics as professional competence, professional ethics and the public interest, tax practice, and relations with clients. The Code of Professional Ethics of the American Institute of Certified Public Accountants and opinions of the Institute's Committee of Professional Ethics are included in the appendix.

LAWMAKERS, THE. James D. Barber. New Haven, Connecticut: Yale University Press. 1965. Pp. 314. $7.50.

In this study the author draws on political science, sociology, and psychology, as well as intensive interviews with state legislators, to gain a unique insight into the motives, resources, and opportunities that produce our legislators. Four types of legislators, which the author labels as Spectators, Advertisers, Reluctants, and Lawmakers, are identified and analyzed in depth. The author is an assistant professor of political science at Yale.

OF MEN, AND NOT OF LAW. Lyman A. Garber. New York, New York: The Devin-Adair Company. 1966. Pp. 196. $3.95.

In this book the author's purpose is to show that the courts, and primarily the Supreme Court, are usurping the political functions and undermining the foundations on which this nation is built. In the book's eleven chapters he deals with such issues as the invasions of state

sovereignty, the assault on personal liberty, and the abandonment of precedent.

SUPREME COURT IN MODERN ROLE, THE. Carl Brent Swisher. New York, New York: New York University Press. 1965. Pp. 221. $6.00.

The author's purpose in this revised edition is "to illuminate for the general reader chosen segments of the Court's performance, both historically and analytically, to aid those who are confused by highly controversial and often emotionalized and undisciplined popular discussion." The segments chosen include, among others, subversion, race, religion, the military, criminal procedure, and legislative redistricting. The author is professor of political science at Johns Hopkins University. He is a past president of the American Political Science Association, and is the author of a number of books on constitutional law and the Supreme Court.

JOURNAL OF THE AMERICAN TRIAL LAWYERS ASSOCIATION—1965. American Trial Lawyers Association Editorial Board. Boston, Massachusetts: American Trial Lawyers Bar Association, 1965. Pp. 705. $10.00.

This book is primarily a compilation of the recent important cases in the fields of tort, workmen's compensation, railroad, admiralty, and aviation law. Each of these five general subjects are subdivided to enable the reader to consult a particular aspect of the general subject. For example, under Tort Law there are such subtopics as Automobile Accidents, Malpractice, Against Charities, Federal Tort Claims Act, Prenatal Injury, and Products Liability. Each subtopic contains a brief of the important case or cases, and following each case there is a Comment which discusses at length the question with which the case dealt.

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Oil & Gas Law, Summers
Titles, Basye, Flick, Patton
Torts, Prosser
Trusts & Trustees, Bogert

FORM BOOKS:

Modern Legal Forms
West's Federal Forms

DICTIONARIES:

Black's Law Dictionary
Bouvier Law Dictionary

BOOKS OF GENERAL REFERENCE:

Words & Phrases
Decennial & General Digests
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